141-206

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1296.

JOHN GORMAN, APPELLANT,

vs.

CARY C. HAVIRD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED SEPTEMBER 22, 1890.

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1 In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, IDAHO TERRITORY, and JOHN GORMAN, Intervenor, Def'ts.

Statement of the Case.

Statement of facts.

This was an action or proceeding commenced by the plaintiff in said court on January 20th, 1890, by filing his petition or affidavit for a writ of mandate directed to the board of county commissioners of Boisé county, Idaho Territory, commanding them to issue warrants to the petitioner, said plaintiff, on the treasury of said Boisé county for the sum of five thousand five hundred and ninety-five & $\frac{47}{100}$ ($5,595.47) dollars claimed by petitioner to be due him from said county for salary and expenses as sheriff of said county during the years 1887 and 1888.

The alternative writ of mandate issued out of and under the seal of said court on said January 20th, 1890, commanding and requiring said board of county commissioners that immediately after
2 the receipt of said writ they cause to be issued to the said Cary C. Havird warrants of said Boisé county upon the treasurer thereof for said sum of $5,595.47, or show cause before said court on the 31st day of January, 1890, why the said board have not done so.

On the return day of said writ defendants appeared and filed a demurrer to plaintiff's petition, and afterwards, to wit, on the 3rd day of February, 1890, said plaintiff asked leave to file his amended petition; to which defendants, by their counsel, objected; which objection was overruled by the court; to which ruling defendant then and there excepted; which exception was allowed by the court.

The demurrer of defendants was thereupon argued and submitted to the court, and thereafter, to wit, on the 5th day of February, 1890, the court rendered and caused to be entered its decision overruling said demurrer; to which ruling and decision defendants thereupon duly excepted; which exception was allowed by the court.

The defendants, The Board of County Commissioners of Boisé County, thereupon filed their answer to the petition and affidavit of plaintiff on Feb'y 6th, 1890. Thereafter, to wit, on February 13th, 1890, on leave of the court first obtained, John Gorman filed his verified complaint in intervention in said action and proceeding; to which ruling of the court plaintiff, by his counsel, there and then
3 duly excepted, and which exception was allowed by the court.

On February 14th, 1890, plaintiff, by his counsel, filed his motion to strike out certain portions of said complaint in intervention, and

on the same day filed the answer of Cary C. Havird, plaintiff, to the said complaint of John Gorman, the intervenor.

On February 17th, 1890, said cause and proceeding came on to be heard in said court, whereupon petitioner introduced in evidence the record of the proceedings of said supreme court on the 11th day of March at its January term, 1889, as follows:

MONDAY, *March 11th*, 1889.

Supreme Court, Idaho Territory.

Court met pursuant to adjournment—present, Hon. H. W. Weir, chief justice; Hon. John L. Logan, ass't justice; Hon. C. H. Berry, ass't justice, and the officers of the court—when the following proceedings were had:

Judgment.

THE PEOPLE OF THE UNITED STATES OF the Ter. of Idaho *ex Rel.* John Gorman, Pl'ff & App.,
v.
C. C. HAVIRD, Def't & Resp.
} On Appeal from the Dist. Court of the 2d Judicial Dist. in and for Boisé County.

4 And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court is delivered by Justice Berry to the effect that the court below be reversed; whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the second judicial district in and for the county of Boisé in the above-entitled cause be, and the same is hereby, reversed.

Also the record of the proceedings of said court on the 18th day of March, at said term, as follows:

MONDAY, *March 18th*, 1889.

Supreme Court, Idaho Territory.

Court met pursuant to adjournment—present, Hon. H. W. Weir, chief justice; Hon. C. H. Berry, ass't justice, and the officers of the court—when the following proceedings were had:

Amended Judgment.

THE PEOPLE, &c., *ex Rel.* JOHN GORMAN, Pl'ff & App.,
v.
C. C. HAVIRD, Def't & Resp.
} Appeal 2d Dist., Boisé Co.

On motion of J. W. Huston, Esq., attorney for respondent, it is ordered that the judgment and order of reversal herein be amended

by adding thereto the following: And all proceedings herein founded on the statute declared by the opinion of the court herein to be null and void are hereby dismissed, the word reversed being struck out.

5 Plaintiff also offered in evidence certain certified copies or transcripts taken from the records of the board of county commissioners of Boisé county, Idaho Territory, which are as follows:

Demand on Board of Co. Com'rs to Issue Warrants to C. C. Havird.

TERRITORY OF IDAHO, }
County of Boisé. }

To Chas. Mann, chairman, and Martin Cathcart and S. M. Sisk, members, of the board of county commissioners of Boisé county, Territory of Idaho:

I hereby demand that you, as said board of Co. com's of Boisé county, order the issue of all warrants due to me as sheriff of Boisé county from April term, 1887, to January term, 1889, the same being 8 in number on the county gen. fund and 8 in the territorial fund, and amounting to the aggregate sum of $5,595.47, and that you order the clerk of said board to deliver the said warrants when issued to C. C. Havird.

C. C. HAVIRD.

Idaho City, 15th Jan., 1890.

TERRITORY OF IDAHO, }
County of Boisé, } *ss:*

6 I, Wm. Warner, auditor and clerk of the board of county commissioners in and for the said county of Boisé, do hereby certify that the foregoing is a true and correct copy of the demand made on the board of county commissioners of said county of Boisé by C. C. Havird on Jan. 15th, 1890.

In witness whereof I have hereunto set my hand and affixed my official seal the 7th day of February, 1890.

[SEAL.] WM. WARNER,
Co. Auditor & Clerk of Board of County Commissioners.

Order of Board of Co. Com'rs Refusing to Issue Warrants.

In the Matter of the Demand Served on the Board by C. C. HAVIRD sheriff of Boisé Co., I. T., requesting the board to order the auditor to issue the warrants due the said sheriff for the years 1887 and 1888.

It is hereby ordered by the board that, as section 381 of the Revised Statutes of Idaho prohibits the issuing of warrants to any officer when such office is contested, no action can be taken in the matter.

TERRITORY OF IDAHO, } ss:
County of Boisé, }

I, Wm. Warner, clerk of the board of Co. com's in and for the county of Boisé, do hereby certify that the foregoing is a correct copy of the order made by the board in relation to the
7 demand made on said board by C. C. Havird for salary, fees, etc.

In witness whereof I have hereunto set my hand and affixed my official seal the 7th day of February, A. D. 1890.

[SEAL.] WM. WARNER,
Clerk B'd Co. Com's.

April Meeting, 1887.

Boisé county officers' salaries.

Order Fixing Compensation of Sheriff, 1887.

Sheriff's salary shall be $1,400.00 per annum. He shall also be allowed in addition to such salary the sum of $1.25 per day for each prisoner confined in county jail as remuneration in full for board, clothing, lights, and medical attendance of such prisoners. He shall be allowed a jailer, for whose services he shall be allowed the sum of $3.00 a day for each day a prisoner or prisoners are confined in the county jail of this county.

(Dated April 13th, 1887.)

Sheriff's quarterly report examined and approved. April 12th, 1887.

Order Allowing Sheriff's Salary.

Ordered by the board that the following bills be allowed on the different funds, to wit:

C. C. Havird, quarter salary, sheriff	$300 00
C. C. Havird, 90 days' jailor's fees	225 00

Objections of John Gorman to Order of Board Allowing Salary of C. C. Havird.

John Gorman appeared, by attorney, before the board and
8 objected to the allowance of the account of C. C. Havird for $525.00, filed with the clerk and presented before the board for salary as sheriff for the quarter ending April 11th, 1887, on the grounds—

1st. That said C. C. Havird did not receive the highest number of votes cast at the general election in said Boisé county for said office of sheriff on Tuesday following the first Monday in November, 1886, and the said C. C. Havird was not elected sheriff of said county.

2nd. That said John Gorman received the highest number of legal votes cast at said election for said office of sheriff and was duly elected sheriff of said county.

3rd. That on or about January 11th, 1887, said C. C. Havird usurped and intruded into said office of sheriff and unlawfully holds and exercises the same.

4th. That said John Gorman as relator has commenced suit in the district court of the 2nd judicial district of said Territory in and for said county against said C. C. Havird, charging him with usurping and intruding into said office, of unlawfully holding the same, and demanding judgment for said office in favor of said John Gorman, said suit being now pending.

5th. That as the legally elected sheriff of said county said John Gorman is entitled to the said salary, fees, &c., claimed by
9 said Havird and embraced in the said account filed by him.

July Meeting, July 11th, 1887.

Sheriff's quarterly report examined and approved.

Order Allowing Salary & Expenses to C. C. Havird as Sheriff.

Ordered that the following bills be allowed on the different funds, as follows, to wit:

County general fund:

C. C. Havird, q't'r sal., sheriff	$350 00
C. C. Havird, 6 days' jailor's fees	18 00
C. C. Havird, 6 days' board of prisoners	7 50
C. C. Havird, collecting license	81 67

Territorial fund:

C. C. Havird, collecting T. & C. license	7 00

October Meeting, October 10th, 1887.

Sheriff's quarterly report examined and approved.

Ordered by the board that the following bills be, and the same are hereby, allowed on the different funds as follows, to wit:

County general fund:

C. C. Havird, q't'r sal. as sheriff	$350 00
C. C. Havird, collecting T. & C. license	65 83
C. C. Havird, collecting Boisé county licenses	22 80
C. C. Havird, board, transportation, & jailor's fees of prisoners	82 75

Territorial fund:

C. C. Havird, collector's percentage on T. & C. licenses	7 31

Order for New Bond by Sheriff.

It is hereby ordered by the board that the sheriff furnish
10 additional bonds at the adjourned meeting of the board, to be held the first Monday in November, on account of the re-

leasement of W. J. Rothwell, one of his bondsmen, he having left the Territory.

Order Approving Supplemental Bond.

NOVEMBER 7TH, 1887.

Ordered by the board that the official supplemental bond of sheriff be, and is hereby, approved.

January Meeting, Jan. 9th, 1888.

Sheriff's quarterly report examined and approved.

Order Allowing Sheriff's Salary & Expenses.

Ordered that the following bills be, and are hereby, allowed on the different funds, as follows, to wit:

County general fund:

C. C. Havird, q't'r sal. as sheriff	$350 00
C. C. Havird, collecting T. & C. & Boisé Co. licenses	87 60
C. C. Havird, 8 days' jailor's fees and board of prisoners	34 00

Territorial fund:

C. C. Havird, collecting T. & C. license	7 20

Order Fixing Compensation of Sheriff for 1888.

JANUARY 11TH, 1888.

Sheriff's salary shall be $1,448 per annum. He shall also be allowed, in addition to such salary, the sum of $1.25 per day for each prisoner confined in county jail as remuneration in full for board, clothing, lights, and medical attendance of such pris-
11 oners. He shall be allowed a jailor, for whose services he shall be allowed the sum of $3.00 per day for each day a prisoner or prisoners are confined in the county jail of this county.

APRIL 9TH, 1888.

Sheriff's report examined and approved.

Order Allowing Salary & Expenses of Sheriff.

Ordered by the board that the following accounts against Boisé county be, and are hereby, allowed on the different funds as follows, to wit:

County general fund:

C. C. Havird, q't'r sal. as sheriff	$362 00
C. C. Havird, 51 days' jailer's fees	153 00
C. C. Havird, board of prisoners	63 75
C. C. Havird, collecting of T. & C. license	82 41

Territorial fund:

C. C. Havird, collecting T. & C. license	$7 29

Ordered by the board that the item of $6.50 in the account of C. C. Havird for horse hire bringing prisoners to county jail be, and is hereby, disallowed, as his salary covers the same.

Ordered by the board that the clerk have twelve notices printed, in compliance with the Revised Statutes of Idaho, for camp fires to be totally extinguished before breaking camp; and C. C. Havird, under agreement with the board for $10.00, is hereby authorized to post said notices in the most conspicuous place at the side of each highway in the county.

12 JULY 9TH, 1888.

Sheriff's quarterly report examined and approved.

Order Allowing Salary & Expenses of Sheriff.

Ordered by the board that the following bills be allowed on the following funds, to wit:

County general fund:

C. C. Havird, posting five notices $10 00

(This bill was paid.)

OCTOBER 8TH, 1888.

Sheriff's report read and approved.

Ordered that the following bills be allowed on the following funds, to wit:

County general fund:

C. C. Havird, six mo.' salary as sheriff	$724 00
C. C. Havird, 181 days' jailer's fees	543 00
C. C. Havird, 181 days' board of prisoners	283 75
C. C. Havird, collecting T. &. C. license	206 91

Territorial fund:

Collecting T. & C. license	$17 72

JANUARY 15TH, 1889.

The board examined the reports of all the county officers and found the reports correct.

Ordered by the board that the following bills be allowed on the different funds, to wit:

County general fund:

C. C. Havird, q't'r salary, fees, and boarding prisoners	$1,149 65

13 Ter. fund:

C. C. Havird, collector's percentage	$5 33

TERRITORY OF IDAHO, } ss:
County of Boisé, }

I, Wm. Warner, clerk of the board of county commissioners in and for the county of Boisé, do hereby certify that the foregoing are

true and correct copies from the commissioners' records of said county for the years 1887, 1888, and including the allowances made during the January term, 1889, so far as relates to the bills of C. C. Havird, as sheriff.

In witness whereof I have hereunto set my hand and affixed my official seal the 8th day of February, A. D. 1890.

[SEAL.] WM. WARNER,
Clerk of the Board of County Commissioners of Boisé Co.

Amounts allowed by the board of county commissioners of Boisé Co., I. T., under the dates hereinafter mentioned, to C. C. Havird for services performed as sheriff of said county, as the same appear under the headings in the commissioners' records.

"Ordered by the board that the following bills be allowed on the different funds as follows, to wit"—including bills of C. C. Havird:

14 *Tabular Statement of Amounts Allowed C. C. Havird, a Sheriff.*

	Quarter salary.	Boarding prisoners.	Jailer's fees.	Collecting license.	Transporting of prisoners.	Collecting license territory.
April 12th, 1887	300 00	----------	225 00	----------	----------	
July 11, "	350 00	7 50	18 00	81 67	----------	7 00
Oct. 10, "	350 00	18 75	45 00	88 63	19 00	7 31
Jan. 9, 1888	350 00	10 00	24 00	87 60	----------	7 20
April 9, "	362 00	63 75	153 00	82 41	----------	7 29
Oct. 8 (6 mo.), "	724 00	283 75	543 00	206 91	----------	17 72
Jan. 15, 1889	362 00	308 50	294 00	48 00	137 15	5 33
	2,798 00	692 25	1,302 00	595 22	156 15	51 85

TERRITORY OF IDAHO, } *ss:*
County of Boisé, }

I, Wm. Warner, auditor in and for the county of Boisé, do hereby certify that the foregoing is true and correct.

In witness whereof I have hereunto set my hand and affixed my official seal the 8th day of February, 1890.

[SEAL.] WM. WARNER,
Auditor Boisé Co., I. T.

Objections of Def'ts to Above Evidence.

To which defendants objected on the ground that such evidence was immaterial and irrelevant, in that it purported to show certain action taken by The Board of County Commissioners of Boisé County, defendant, on certain claims of plaintiff allowed by said board, and

that it is inadmissable as any evidence whatever of the fact
15 as to whether or not said board of county commissioners had ordered paid the claims or accounts of plaintiff, and constituted no evidence that said board had not made such orders for payment to plaintiff of his allowances by said board; which objections were overruled by the court and said copies admitted as evidence; to which ruling defendants then and there duly excepted, which exceptions were allowed by the court.

Plaintiff then offered in evidence the opinion of the court announced by Associate Justice Berry, of said court, rendered at the January term, 1889, of said court, as follows:

Opinion of Justice Berry.

"In the Supreme Court of the Territory of Idaho. January Term, 1889.

THE PEOPLE OF THE UNITED STATES OF THE TERRITORY OF IDAHO *ex Rel.* JOHN GORMAN, Appellant,
vs.
C. C. HAVIRD, Respondent.

George Anslie, att'y for appellant.
Huston and Gray, for respondent.

Proceedings in the nature of *quo warranto.*

16 1. An action under act of January 30th, 1885, to try title to an office to which there are several claimants is one of legal and not of equitable cognizance. The issues in such action or proceeding are legal ones and the trial of such issues by a jury is a constitutional right of the parties.

2. That part of section 536, said act, providing that actions of this nature 'shall be tried by the judge of the district court, at chambers, and without the intervention of a jury,' is held unconstitutional and void.

This action is under an act of the territorial Legislature of Idaho, passed January 30th, 1885, being sections 534–542, inclusive, and its purpose to try the title of the respondent to the office of sheriff of Boisé county.

It has the usual provisions for obtaining jurisdiction of the parties, the formation of issues by pleading, the trial of those issues, and the rendition of judgment, with the further privilege of appeal to this court.

The proceeding is called by the act 'an action,' and it is so treated by both parties, and it must be so considered for the purpose of this appeal. Its purpose, however, is to attain the
17 end reached by a writ of *quo warranto* at common law or a writ of right for the king against him who improperly claimed or usurped an office. Such a writ is not suited to our form of Government, and in America it has fallen into disuse,

and statutory proceedings in the nature of a writ of *quo warranto* have in most of the States, if not in all, taken its place.

Those statutes vary in the extent of the remedy which they furnish. Some, as in Alabama—Stat. Ala., Feb'y 3, 1840, sec. 4—make of the court a mere inquisition to ascertain the regularity of the election. These have been held not to confer judicial power upon the court, as in a suit at common law; hence that exercise of the right to hear and decide is rather in the character of supervisor of elections, and do- not require the intervention of a jury. In other States this statutory proceeding has approximated more nearly in its scope to the writ of *quo warranto*, still retaining the criminal form of the writ, but using it as a civil remedy only. In our own Territory our Legislature has gone much further and includes within its act the full scope of an information, in the nature of a writ of *quo warranto*, including its criminal features and power to punish. Such information in the nature of a writ of *quo*
18 *warranto* was properly a criminal method of *of* prosecution as well to punish the usurper by a fine for the usurpation of the franchise as to oust him or seize the office for the crown.

Paine on Elections, 710.

This law not only provides for supervision of elections and the correction of errors, but it goes further and places in the court unmistakable judicial power. Section 541 provides 'that when a defendant against whom such action has been brought is adjudged guilty of usurping or intruding into or unlawfully holding any office, franchise, or privilege judgment must be rendered that the defendant be excluded from the office, franchise, or privilege, and that he pay the cost of the action. The court or judge may also, in its or his discretion, impose upon the defendant a fine not exceeding two thousand dollars.'

Here are questions not merely as to regularity of an election, but also of personal guilt or innocence, followed by pecuniary consequences of no small moment. It aims not only at a civil remedy, but also at a criminal trial, personal punishment, and pecuniary fine and loss. The act of wilful intrusion into a public office to which one has not been elected is declared to be a misdemeanor.

Rev. Stats. Idaho, sec. 6388.

19 The section of the act in question under which the district judge, at chambers, assumed jurisdiction and tried this case is section 536, act of 1885, providing, among other things, 'And such action shall be heard and determined by the judge of the district court, at chambers, and without the intervention of a jury, after due service of the summons, and at the expiration of time allowed by law for answering the complaint in a civil action, but no judgment shall be rendered in such action by default.'

This is an essential provision of the act, and without which the other provisions are inoperative. If this is unconstitution-, as respondent claims, the remedy under the act fails. This objection was taken by the respondent before the answer was filed. His exceptions to the ruling were then and there settled by the judge and

are incorporated as a part of the statement of the case on appeal. The respondent still stands upon such objection and exceptions in this court. It is true that the court upon the hearing found for the defendant and that the defendant does not appeal, yet it is not easy to see, if the objection was valid when it was taken, how his failure to appeal from a finding in his favor, where he has all along and on appeal insisted on his objection, should be construed as a waiver of his exception. If, indeed, in any case it might be so waived it cannot be so in this case, for the objection goes to the jurisdiction of the court, to the validity of the statute, and not merely to an irregularity. That is not subject to such waiver. If that part of the act is void the objection may be made at any time, even on appeal.

The ground- on which it is urged that this provision is unconstitution- are, 1st, that it denies the right of trial by jury; 2nd, that it creates a tribunal unknown and unauthorized by the laws.

Section 1868 of the Revised Statutes of the United States as amended April 7th, 1874, prescribing and limiting the powers of territorial legislatures, provides that 'No party shall be deprived of the right of trial by jury in cases cognizable by the common law.'

Again, the Constitution of the United States, art. 3rd, section 2nd, 'The trial of all crimes, except in cases of impeachment, shall be by jury.'

Again, *id.*, art. 5, amendments, 'No person shall be deprived of life, liberty, or property without due process of law.'

And again, *id.*, amendment 7, 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'

There seems to have been a disposition in some States under their own constitutions to evade these provisions, whether of the United States or State constitutions or *or* such of them as clearly affect the case. Some courts have gone so far as to deny squar-ley that proceedings of this nature are of legal instead of equitable cognizance.

A Missouri case, State *ex rel.* Norton *vs.* Lupton, 27 Am. Reports, 253, so holds; but this case is met by the New York court of appeals in People *vs.* A. & S. R. Co. *et al.*, 57 N. Y., 161, in which case the court holds that an action in the nature of a *quo warranto*, brought by the attorney general in the name of the people of the State to try the title to a corporate office to which there are several claimants, is one of legal and not equitable cognizance; that the issues therein are strictly legal ones, and that the trial of such by a jury is the constitutional right of the parties. The constitutional guaranty of the right of trial by jury in that State goes no further than the provisions of the Federal Constitution and the act of Congress cited, section 1868, as amended and made especially to apply to our territorial Legislature; nor can the territorial Legislature pass any law in contravention of the Constitution or the laws of the United States. U. S. Rev. Stats., sec. 1851. In other cases, as in the State of Illinois, the statute itself only confers a supervi-

sory power over the regularity of the election and does not at all apply to much of the ground covered by the statute of Idaho.

A Louisiana court, in Joseph *vs.* Bidwell, 26 Am. Rep., 102, holds that the Federal Constitution in that respect can have no application to the State courts. Perhaps, as Louisiana is a sovereign State, that claim may be sustained. Other cases cited by the appellant hold the same. But we are not called upon to discuss that question. Idaho is not a State, but is a Territory of the United States and in all things subject to the Constitution of the United States and the laws of Congress. Section 1868 of the United States Revised Statutes as amended seems to meet this case and is conclusive. Even were this otherwise and the question arose under the common law which is adopted in this Territory, Rev. Stats., sec. 18, the weight of the authority is in favor of the construction given by the New York court of appeals in the case of that State above
23 cited, but arising under the State constitution.

See also Reynolds *vs.* State, 61 Ind., 392.
People *vs.* Van Slyck, 4 Cowen, New York, 297.
People *vs.* Ferguson, 8 *id.*, 103.

But it is contended by the appellant that if the issues here are triable by jury, and the objection was or is properly taken, and for that reason the judgment should be reversed, still a new trial should be granted. The answer to this may be that the proceedings in the court below were under the act in question, and, if wrong, it is because that part of the act on which they are based is invalid and no valid judgment could be had; that, while the action in its present form cannot proceed, amendment changing its nature and purpose is not authorized by law. We are not called to decide that point. There is no intimation of a purpose to amend or change the proceeding in any way, even if allowable.

The term of office of the defendant expired in January, 1889, and we see no purpose which could no- be reached by any proceeding of this nature.

All that part of section 536 of the act entitled 'An act to amend chapter 35 of the Code of Civil Procedure, being sections 534
24 to 542, inclusive,' approved January 30th, 1885, beginning at the words 'and such action,' in the fourth line thereof, to and including the words 'in a civil action,' in the eighth line thereof, must be declared unconstitutional and void, and the judgment herein must be reversed.

Judgment reversed."

To which defendants objected. The objection was overruled by the court and defendants excepted, which exception was allowed by the court.

Plaintiff then rested and defendants offered in evidence the record entry of the proceedings of said supreme court on March 19th, at its January term, 1889, which is as follows:

Supreme Court of Idaho Territory.

TUESDAY, *March 19th*, 1889.

Court met pursuant to adjournment—present, Hon. H. W. Weir, chief justice; Hon. John L. Logan, ass't justice; Hon. C. H. Berry, ass't justice, and the officers of the court—when the following proceedings were had:

THE PEOPLE, &c., *ex Rel.* JOHN GORMAN *vs.* C. C. HAVIRD. } Appeal 2nd Dist., Boisé Co.

25 *Order of Court Denying Motion to Change Judgment.*

Weir, chief justice, and Logan, justice, reconsidering the granting of the motion granted herein March 18th, 1889, without notice, deny the motion, the opinion to stand "judgment reversed," and the case remanded to court below to proceed in such manner as it shall deem proper.

Ordered that this court do now adjourn *sine die*.

H. W. WEIR,
Chief Justice.

26 To which offer plaintiff objected; the objection was overruled by the court and said evidence admitted; to which ruling plaintiff then and there excepted, which exception was allowed by the court.

Defendants then offered in evidence certified copies of the remittitur sent from said supreme court down to the district court and of the record of said district court containing the contested election case of The People, &c., *ex rel.* John Gorman *vs.* Cary C. Havird, until the next term of said court; which said certified copies so offered in evidence are as follows and admitted in evidence by the court:

Remittitur Sent to Court Below.

In the Supreme Court of the Territory of Idaho. January Term, A. D. 1889.

THE PEOPLE OF THE UNITED STATES OF TER. OF IDAHO *ex Rel.* JOHN GORMAN *vs.* C. C. HAVIRD. } On an Appeal from the District Court of the Second Judicial District in and for Boisé County.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by ——, to the effect that the judgment of the court below be reversed.

27 Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district

court of the second judicial district in and for the county of Boisé in the above-entitled cause be, and the same is hereby, reversed, and the case is remanded to the court below to proceed in such manner as it shall deem proper.

I, S. H. Hays, clerk of the supreme court of the Territory of Idaho, do hereby certify that the foregoing is a true copy of an original judgment as amended March 19th, 1889, entered in the above-entitled cause on the eleventh day of March, A. D. 1889, and now remaining of record in my office.

Witness my hand and seal of the court affixed at my
[SEAL.] *my* office this 19th day of March, A. D. 1889.

S. H. HAYS, *Clerk.*

TERRITORY OF IDAHO, } ss:
County of Boisé, }

I hereby certify the foregoing to be a true copy of the original remittitur on file in my office in the above-entitled action.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of the district court this 13th day of February, A. D. 1890.

SOL. HASBROUCK,
Clerk Dist. Court,
By ISADOR SMITH, *Deputy.*

28 Endorsed: In the supreme court, Territory of Idaho. Remittitur. The People *ex rel.* John Gorman *v.* C. C. Havird. (Certified copy.)

Record of Court Below.

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Boisé. November Term, 1889.

Present: Hon. H. W. Weir, judge.

FRIDAY, *November* 22*d*, 1889.

The following order was entered of record:

THE PEOPLE OF THE U. S., &c., *ex Rel.* JOHN GORMAN }
vs.
C. C. HAVIRD. }

Continuance.

Ordered that this cause be, and is hereby, continued until next term.

TERRITORY OF IDAHO, } ss:
County of Boisé, }

I hereby certify that the foregoing is a true copy from the record of an order entered on the 22d day of November, 1889.

Witness my hand and the seal of said court affixed this
[SEAL.] 13th day of February, A. D. 1890.

SOL. HASBROUCK, *Clerk*,
By ISIDOR SMITH, *Deputy*.

Endorsed: District court, Boisé county, Idaho Territory. The People *ex rel.* John Gorman *vs.* C. C. Havird. Certified copy from the record of an order entered Nov. 22d, 1889.

29 To the introduction of which severally the plaintiff objected. The objection was overruled, said copies admitted and received in evidence by the court; to which ruling plaintiff then and there duly excepted, which exception was allowed by the court.

Offer of Pl'ffs to Show by Parol Testimony that a Certain Judgment was not a Record of Court.

The plaintiff in rebuttal offered and asked leave of the court to show by parol testimony that the following entry in the records of said supreme court under date of March 19th, 1889, to wit: "Weir, chief justice, and Logan, justice, reconsidering the granting of the motion granted herein March 18th, 1889, without notice, deny the motion, the opinion to stand 'judgment reversed,' and the cause remanded to court below to proceed in such manner as it shall deem proper," is not a record of said court; that said entry was dictated and made after the adjournment *sine die* of said January term, 1889, of said court; that it was made at a place other than that where said court was held, and while said court was not in session, without the knowledge, consent, or concurrence of one member of the court or of the parties to said action.

Which said offer was, on February 19th, 1890, denied by said court; to which ruling and decision of said court excluding such evidence plaintiff, by his counsel, then and there duly excepted, and which exception was allowed by the court.

30 Defendants then rested, and, the evidence being closed, the case was then argued by counsel and submitted to the court.

And thereafter, to wit, on February 24th, 1890, said court rendered and entered its judgment and decision therein as follows, to wit:

Judgment.

FEB'Y 24TH, 1890.

HAVIRD
v.
BOISÉ CO., GORMAN, Int.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court is delivered to the effect that the action now pending in the lower court, entitled The Territory of Idaho *ex rel.* John Gorman *vs.* C. C. Havird,

be dismissed, and that a peremptory writ of mandate issue, directing the defendant The County Commissioners of Boisé County to order the issuing of a warrant or warrants in the name of plaintiff herein for the amounts heretofore allowed by said board during the time specified on account of fees and expenses, and that immediately upon the dismissal of said action by said district court a writ
31 of mandate shall issue commanding said commissioners to order the issuing of a warrant or warrants in the name of plaintiff herein for the amount due him as salary for the time specified.

It is so ordered by the court.

Thereafter, to wit, on February 28th, 1890, and during said term, said court amended said judgment as follows:

Amended Judgment.

BOISÉ CITY, IDAHO, *Feb. 28th*, 1890.

Supreme Court, Idaho Territory.

Court met pursuant to adjournment—present, Hon. James H. Beatty, chief justice; Hon. C. H. Berry, associate justice; Hon. Willis Sweet, associate justice, and the officers of the court—when the following proceedings were had:

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ CO., JOHN GORMAN, Intervenor.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, the opinion of
32 the court is delivered by Mr. Justice Sweet to the effect that the action now pending in the second district court in and for Boisé Co., entitled The Territory of Idaho *ex rel.* John Gorman *vs.* C. C. Havird, should be dismissed, and that a writ of mandate forthwith issue under the seal of the clerk of this court, directing the defendant, The County Commissioners of Boisé Co., to order the issuing of a warrant or warrants in the name of the plaintiff herein for the amounts heretofore allowed by said board for the time specified on account of fees and expenses, and that immediately upon the dismissal of said action by said district court a writ of mandate issue, under the seal of the clerk of this court, commanding said c[illegible]issioners to order the issuing of a warrant or warrants in the nam[illegible] plaintiff herein for the amount due him as salary for the time specified, and that a copy hereof be certified to said district court.

It is so ordered by the court.

The said John Gorman, defendant and intervenor, having heretofore moved in open court that said court allow him an appeal from such judgment and decision of said court to the Supreme Court of the United States, the said supreme court of said Territory
33 thereafter, to wit, on March 1st, 1890, being a day of said term, made and cause- to be entered the following order granting such motion, viz:

Order Allowing Appeal to U. S. Supreme Court.

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, JOHN GORMAN, Intervenor.

And now, at this day, the application of the intervenor herein for the allowance of an appeal to the Supreme Court of the United States from the judgment heretofore rendered herein in this court was by the court granted upon the filing of a supersedeas bond in the sum of eight thousand dollars, and one week's time is given in which to file said bond.

The defendant and intervenor, John Gorman, having tendered a supersedeas bond herein, said court, on March 5th, 1890, being a day of said term of said court, made and caused to be entered the further order of said court as follows:

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY & JOHN GORMAN, Intervenor.

34 Exceptions having been made to the bond on appeal to the Supreme Court of the United States offered herein, it is ordered that the return of the remittitur herein be stayed pending the approval of appellant's bond on the appeal to the Supreme Court of the United States, the said bond to be approved by the judge of the second judicial district, at Boisé City, and the entire proceedings are stayed herein pending the examination of appellant's sureties by said judge as aforesaid upon the exceptions made to such sureties by respondent, and if said bond now on file be not approved that a new bond may be presented, subject to exceptions by respondent for such approval, and when so offered shall be filed in this court. The time for examination and approval shall not extend beyond thirty days from the date hereof.

I hereby certify that the foregoing is a correct statement of the proceedings had in the above-entitled cause in the supreme court of Idaho Territory at the January term, 1890, the

Given this 10th day of March, 1890.

JAS. H. BEATTY,
Chief Justice of Supreme Court of Idaho Territory.

35 *Supersedeas Bond.*

Know all men by these presents that we, John Garrecht, Peter Donahue, Thomas Carrigan, Samuel T. Davis, Robert K. Davis, and George Anislie, Ben. Willson & W. A. Coughanour, are held and firmly bound unto Cary C. Haviard in the full and just sum of eight thousand dollars, to be paid to the said Cary C. Haviard, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at the January term, 1890, of the supreme court of Idaho Territory, in a suit depending in said court between Cary C. Haviard, as plaintiff, and The Board of County Commissioners of Boisé County, Idaho Territory, and John Gorman, intervenor, *were* defendants, judgment was rendered against the said defendants and said intervenor, and the said intervenor, John Gorman, having made a motion in open court for the allowance of an appeal by him from the judgment and decision of said court aforesaid to the Supreme Court of the United States, and such motion having been sustained and such appeal allowed by said supreme court of Idaho Territory, now, therefore, the condition of the above obliga-

36 tion is such that if the said defendant and intervenor, John Gorman, appellant, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN GARRECHT. [SEAL.]
PETER DONAHUE. [SEAL.]
THOMAS CARRIGAN. [SEAL.]
SAM. T. DAVIS. [SEAL.]
ROB'T K. DAVIS. [SEAL.]
GEO. AINSLIE. [SEAL.]
BEN. WILLSON. [SEAL.]
W. A. COUGHANOUR. [SEAL.]

TERRITORY OF IDAHO, } ss:
County of Boisé, }

Be it remembered that on this third day of March, A. D. 1890, before me, T. S. Hart, the probate judge of Boisé county, Idaho Territory, personally appeared John Garrecht, Sen., Peter Donahue, Thomas Carrigan, Samuel T. Davis, & Robert K. Davis, all of whom are personally known to me to be the persons named in and who subscribed their names to the above and foregoing bond, and they each severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein stated.

[SEAL.] Witness my hand and seal of office, at Idaho City, the day and year first above written.

T. S. HART,
Probate Judge of Boisé County, Idaho Territory.

37 TERRITORY OF IDAHO, } ss:
County of Boisé, }

John Garrecht, Sen., Peter Donahue, Thomas Carrigan, Samuel T. Davis, & Robert K. Davis, being severally duly sworn, on oath depose and say, each for himself, that he is a resident and householder of the Territory of Idaho, and that he is worth the following sums, to wit:

He, the said John Garrecht, Sen., the sum of five thousand dollars.

He, the said Peter Donahue, the sum of one thousand & five hundred dollars.

He, the said Thomas Carrigan, the sum of one thousand five hundred dollars.

He, the said Samuel T. Davis, the sum of one thousand five hundred dollars.

He, the said Robert K. Davis, the sum of one thousand five hundred dollars, over and above all his just debts and liabilities and exclusive of property exempt from execution.

JOHN GARRECHT.
PETER DONAHUE.
THOMAS CARRIGAN.
SAM. T. DAVIS.
ROB'T K. DAVIS.

[SEAL.] Subscribed and sworn to before me this 3d day of March, A. D. 1890.

T. S. HART,
Probate Judge.

38 TERRITORY OF IDAHO, } ss:
County of Ada, }

This affiant, George Ainslie, being first duly sworn, on oath says that he is a resident and householder of the Territory of Idaho, and that he is worth the sum of twenty thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. AINSLIE.

Subscribed & sworn to before me March 5th, 1890.
[SEAL.] S. H. HAYS, *Clerk.*

TERRITORY OF IDAHO, } ss:
County of Ada, }

Ben. Willson and W. A. Coughanour, sureties in the above and foregoing undertaking, being each duly sworn, on oath depose and say, each for himself and not one for the other, that he is a resident and householder within said Territory, and is worth the sum of eight thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

W. A. COUGHANOUR.
BEN. WILLSON.

Subscribed & sworn to before me March 10th, 1890.
[SEAL.] JO. W. HUSTON,
Notary Public.

39 Endorsed: Supreme court of Idaho Territory. Jan'y term, 1890. Cary C. Havird, pl'ff, *vs.* The Board of Co. Commissioners Boisé County, Idaho, & John Gorman, intervenor.

Approval of Bond.

Supersedeas bond.

The within bond, having been accepted by pl'ff's att'y and being by me considered sufficient, is this 10th day of March, 1890, by me approved.

JAS. H. BEATTY,
Chief Justice Supreme Court of Idaho Territory.

Waiver of Pl'ff's Att'y.

I hereby waive all exceptions to the within bond & sufficiency of the sureties.

JO. W. HUSTON,
Att'y for Pl'ff.

Filed March 21st, 1890.

SOL. HASBROUCK,
Clerk Supreme Court.

40 SUPREME CLERK'S OFFICE, *Boisé City, Idaho,* } ss:

I, Sol. Hasbrouck, clerk of the supreme court of Idaho, do hereby certify that the above and foregoing is a full and true copy of the statement of the case of Cary C. Havird against The Board of County Commissioners of Boisé County, Idaho Territory, and John Gorman, intervenor, consisting of the record of the board of county commissioners of Boisé county, the record of the district court of the 2d judicial district, and the record of the supreme court of Idaho, and also the supersedeas bond on appeal and the approval of the same, the whole being the transcript on appeal and consisting of 39 pages, as appears on the face thereof.

Witness my hand and the seal of said supreme court hereto affixed this 30th day of August, A. D. 1890.

Seal Supreme Court, Idaho Territory.

SOL. HASBROUCK, *Clerk.*

Endorsed on cover: Idaho Territory supreme court. No. 1296. John Gorman, appellant, *vs.* Cary C. Havird. Filed September 22, 1890.

WRIT OF CERTIORARI AND RETURN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1296.

JOHN GORMAN, APPELLANT,

vs.

CARY C. HAVIRD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 20, 1891.

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1 In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, Idaho Territory, and JOHN GORMAN, Intervenor, Def'ts. } 1296.

Statement of the Case.

Statement of facts.

This was an action or proceeding commenced by the plaintiff in said court on January 20th, 1890, by filing his petition or affidavit for a writ of mandate directed to the Board of County Commissioners of Boisé County, Idaho Territory, commanding them to issue warrants to the petitioner, said plaintiff, on the treasury of said Boisé county for the sum of five thousand five hundred and ninety-five & $\frac{47}{100}$ ($5,595.47) dollars, claimed by petitioner to be due him from said county for salary and expenses as sheriff of said county during the years 1887 and 1888.

2. The alternative writ of mandate issued out of and under the seal of said court on said January 20th, 1890, commanding and requiring said board of county commissioners that immediately after the receipt of said writ they cause to be issued to the said Cary C. Haviird warrants of said Boisé county upon the treasurer
2 thereof for said sum of $5,595.47 or show cause before said court on the 31st day of January, 1890, why the said board have not done so.

On the return day of said writ defendants appeared and filed a demurrer to plaintiff's petition, and afterwards, to wit, on the 3rd day of February, 1890, said plaintiff asked leave to file his amended petition; to which defendants, by their counsel, objected; which objection was overruled by the court; to which ruling defendant then and there excepted; which exception was allowed by the court.

The demurrer of defendants was thereupon argued and submitted to the court, and thereafter, to wit, on the 5th day of February, 1890, the court rendered and caused to be entered its decision overruling said demurrer; to which ruling and decision defendants thereupon duly excepted; which exception was allowed by the court.

The defendants, The Board of County Commissioners of Boisé County, thereupon filed their answer to the petition and affidavit of plaintiff on Feb'y 6th, 1890. Thereafter, to wit, on February 13th, 1890, on leave of the court first obtained, John Gorman filed his verified complaint in intervention in said action and proceeding; to which ruling of the court plaintiff, by his counsel, there and then duly excepted, and which exception was allowed by the court.

3. On February 14th, 1890, plaintiff, by his counsel, filed his motion to strike out certain portions of said complaint in interven-

tion, and on the same day filed the answer of Cary C. Havird, plaintiff, to the said complaint of John Gorman, the intervenor.

On February 17th, 1890, said cause and proceeding came on to be heard in said court; whereupon petitioner introduced
3 in evidence the record of the proceedings of said supreme court on the 11th day of March, at its January term, 1889, as follows:

MONDAY, *March 11th*, 1889.

Supreme Court, Idaho Territory.

Court met pursuant to adjournment—present, Hon. H. W. Weir, chief justice; Hon. John L. Logan, ass't justice; Hon. C. H. Berry, ass't justice, and the officers of the court—when the following proceedings were had:

Judgment.

THE PEOPLE OF THE UNITED STATES OF THE TER. OF IDAHO *ex Rel.* JOHN GORMAN, Pl'ff & App., *v.* C. C. HAVIRD, Def't & Resp.	On Appeal from the Dist. Court of the 2d Judicial Dist. in and for Boisé County.

4. And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court is delivered by Justice Berry to the effect that the court below be reversed. Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the second judicial district in and for the county of Boisé in the above-entitled cause be, and the same is hereby, reversed.

Also the record of the proceedings of said court on the 18th day of March, at said term, as follows:

4 MONDAY, *March 18th*, 1889.

Supreme Court, Idaho Territory.

Court met pursuant to adjournment—present, Hon. H. W. Weir, chief justice; Hon. C. H. Berry, ass't justice, and the officers of the court—when the following proceedings were had:

Amended Judgment.

THE PEOPLE, &c., *ex Rel.* JOHN GORMAN, Pl'ff & App., *v.* C. C. HAVIRD, Def't & Resp.	Appeal, 2d Dist., Boisé County.

On motion of J. W. Huston, Esq., attorney for respondent, it is ordered that the judgment and order of reversal herein be amended

by adding thereto the following: And all proceedings herein founded on the statute declared by the opinion of the court herein to be null and void are hereby dismissed, the word reversed being struck out.

5. Plaintiff also offered in evidence certain certified copies or transcripts taken from the records of the Board of County Commissioners of Boisé County, Idaho Territory, which are as follows:

Demand on Board of Co. Com'rs to Issue Warrants to C. C. Havird.

TERRITORY OF IDAHO, }
County of Boisé. }

To Chas. Mann, chairman, and Martin Cathcart and S. M. Sisk, members of the Board of County Commissioners of Boisé County, Territory of Idaho:

5 I hereby demand that you as said Board of Co. Com's of Boisé County order the issue of all warrants due to me as sheriff of Boisé county from April term, 1887, to January term, 1889, the same being 8 in number on the county gen. fund and 8 in the territorial fund, and amounting to the aggregate sum of $5,595.47, and that you order the clerk of said board to deliver the said warrants, when issued, to C. C. Havird.

C. C. HAVIRD.

Idaho City, 15th Jan., 1890.

TERRITORY OF IDAHO, }
County of Boisé, } *ss:*

6. I, Wm. Warner, auditor and clerk of the Board of County Commissioners in and for the said County of Boisé, do hereby certify that the foregoing is a true and correct copy of the demand made on the Board of County Commissioners of said County of Boisé by C. C. Havird on Jan. 15th, 1890.

In witness whereof I have hereunto set my hand and affixed my official seal the 7th day of February, 1890.

[SEAL.] WM. WARNER,
Co. Auditor & Clerk of Board of County Commissioners.

Order of Board of Co. Com'rs Refusing to Issue Warrants.

In the Matter of the Demand Served on the Board by C. C. HAVIRD, Sheriff of Boisé Co., I. T., requesting the board to order the auditor to issue the warrants due the said sheriff for the years 1887 and 1888.

6 It is hereby ordered by the board that, as section 381 of the Revised Statutes of Idaho prohibits the issuing of warrants to any officer when such office is contested, no action can be taken in the matter.

TERRITORY OF IDAHO, } ss:
County of Boisé, }

7. I, Wm. Warner, clerk of the Board of Co. Com's in and for the County of Boisé, do hereby certify that the foregoing is a correct copy of the order made by the board in relation to the demand made on said board by C. C. Havird for salary, fees, etc.

In witness whereof I have hereunto set my hand and affixed my official seal the 7th day of February, A. D. 1890.

[SEAL.] WM. WARNER,
Clerk B'd Co. Com's.

April Meeting, 1887.

Boisé county officers' salaries.

Order Fixing Compensation of Sheriff, 1887.

Sheriff's salary shall be $1,400.00 per annum. He shall also be allowed, in addition to such salary, the sum of $1.25 per day for each prisoner confined in county jail as remuneration in full for board, clothing, lights, and medical attendance of such prisoners. He shall be allowed a jailer, for whose services he shall be allowed the sum of $3.00 a day for each day a prisoner or prisoners are confined in the county jail of this county.

(Dated April 13th, 1887.)

7 Sheriff's quarterly report examined and approved April 12th, 1887.

Order Allowing Sheriff's Salary.

Ordered by the board that the following bills be allowed on the different funds, to wit:

C. C. Havird, quarter'- salary, sheriff	$300 00
C. C. Havird, 90 days' jailor's fees	225 00

Objections of John Gorman to Order of Board Allowing Salary of C. C. Havird.

8. John Gorman appeared by attorney before the board and objected to the allowance of the account of C. C. Havird for $525.00, filed with the clerk and presented before the board for salary as sheriff for the quarter ending April 11th, 1887, on the grounds—

1st. That said C. C. Havird did not receive the highest number of votes cast at the general election in said Boisé county for said office of sheriff on Tuesday following the first Monday in November, 1886, and the said C. C. Havird was not elected sheriff of said county.

2nd. That said John Gorman received the highest number of legal votes cast at said election for said office of sheriff, and was duly elected sheriff of said county.

3rd. That on or about January 11th, 1887, said C. C. Havird

usurped and intruded into said office of sheriff and unlawfully holds and exercises the same.

4th. That said John Gorman as relator has commenced suit in the district court of the 2nd judicial district of said Territory
8 in and for said county against said C. C. Havird, charging him with usurping and intruding into said *said* office, of unlawfully holding the same, and demanding judgment for said office in favor of said John Gorman, said suit being now pending.

5th. That as the legally elected sheriff of said county said John Gorman is entitled to the said salary, fees, &c., claimed by said Havird and embraced in the said account filed by him.

July Meeting, July 11th, 1887.

Sheriff's quarterly report examined and approved.

Order allowing salary & expenses to C. C. Havird as sheriff.

Ordered that the following bills be allowed on the different funds as follows, to wit:

County General Fund.

C. C. Havird, q't'r sal., sheriff	$350 00
C. C. Havird, 6 days' jailor's fees	18 00
C. C. Havird, 6 days' board of prisoners	7 50
C. C. Havird, collecting license	81 67

Territorial Fund.

C. C. Havird, collecting T. & C. license	7 00

October Meeting, October 10*th*, 1887.

Sheriff's quarterly report examined and approved.

Ordered by the board that the following bills be, and the same are hereby, allowed on the different funds as follows, to wit:

9 *County General Fund.*

C. C. Havird, q't'r sal. as sheriff	$350 00
C. C. Havird, collecting T. & C. license	65 83
C. C. Havird, collecting Boisé county licenses	22 80
C. C. Havird, board, transportation, & jailor's fees of prisoners	82 75

Territorial Fund.

C. C. Havird, collector's percentage on T. & C. licenses	7 31

Order for New Bond by Sheriff.

10. It is hereby ordered by the board that the sheriff furnish additional bonds at the adjourned meeting of the board, to be held the first Monday in November, on account of the releasement of W. J. Rothwell, one of his bondsmen, he having left the Territory.

Order Approving Supplemental Bond.

NOVEMBER 7TH, 1887.

Ordered by the board that the official supplemental bond of sheriff be, and is hereby, approved.

January Meeting, Jan. 9th, 1888.

Sheriff's quarterly report examined and approved.

Order Allowing Sheriff's Salary & Expenses.

Ordered that the following bills be, and are hereby, allowed on the different funds as follows, to wit:

County General Fund.

C. C. Havird, q't'r sal. as sheriff	$350 00
C. C. Havird, collecting T. & C. & Boisé Co. licenses	87 60
C. C. Havird, 8 days jailor's fees and board of prisoners	34 00

Territorial Fund.

C. C. Havird, collecting T. & C. license	7 20

Order Fixing Compensation of Sheriff for 1888.

JANUARY 11TH, 1888.

11. Sheriff's salary shall be $1,448 per annum. He shall also be allowed, in addition to such salary, the sum of $1.25 per day for each prisoner confined in county jail as remeneration in full for board, clothing, lights, and medical attendance of such prisoners. He shall be allowed a jailor, for whose services he shall be allowed the sum of $3.00 per day for each day a prisoner or prisoners are confined in the county jail of this county.

APRIL 9TH, 1888.

Sheriff's report examined and approved.

Order Allowing Salary & Expenses of Sheriff.

Ordered by the board that the following accounts against Boisé county be, and are hereby, allowed on the different funds as follows, to wit:

County General Fund.

C. C. Havird, q't'r sal. as sheriff	$362 00
C. C. Havird, 51 days' jailor's fees	153 00
C. C. Havird, board of prisoners	63 75
C. C. Havird, collecting of T. & C. license	82 41

Territorial Fund.

C. C. Havird, collecting T. & C. license	$7 29

11 Ordered by the board that the item of $6.50 in the account of C. C. Havird for horse hire, bringing prisoners to county jail, be, and is hereby, disallowed, as his salary covers the same.

Ordered by the board that the clerk have twelve notices printed, in compliance with the Revised Statutes of Idaho, for camp fires to be totally extinguished before breaking camp, and C. C. Havird, under agreement with the board for $10.00, is hereby authorized to post said notices in the most conspicuous place at the side of each highway in the county.

JULY 9TH, 1888.

12. Sheriff's quarterly report examined and approved.

Order Allowing Salary & Expenses of Sheriff.

Ordered by the board that the following bills be allowed on the following funds, to wit:

County General Fund.

C. C. Havird, posting five notices $10 00

(This bill was paid.)

OCTOBER 8TH, 1888.

Sheriff's report read and approved.

Ordered that the following bills be allowed on the following funds, to wit:

County General Fund.

C. C. Havird, six mo.' salary as sheriff	$724 00
C. C. Havird, 181 days' jailor's fees	543 00
C. C. Havird, 181 days' board of prisoners	283 75
C. C. Havird, collecting T. & C. license	206 91

12 *Territorial Fund.*

Collecting T. & C. license $17 72

JANUARY 15TH, 1889.

The board examined the reports of all the county officers and found the reports correct.

Ordered by the board that the following bills be allowed on the different funds, to wit:

County General Fund.

C. C. Havird, q't'r salary, fees, and boarding prisoners ... $1,149 65

13. *Ter. Fund.*

C. C. Havird, collector's percentage $5 33

TERRITORY OF IDAHO, } ss:
County of Boisé, }

I, Wm. Warner, clerk of the Board of County Commissioners in and for the County of Boisé, do hereby certify that the foregoing are true and correct copies from the commissioners' records of said county for the years 1887 and 1888, and including the allowances made during the January term, 1889, so far as relates to the bills of C. C. Havird as sheriff.

In witness whereof I have hereunto set my hand and affixed my official seal the 8th day of February, A. D. 1890.

[SEAL.] WM. WARNER,
Clerk of the Board of County Commissioners of Boisé Co.

Amounts allowed by the Board of County Commissioners of Boisé Co., *T.* T., under the dates hereinafter mentioned, to C. C. Havird for services performed as sheriff of said county, as the same
13 appear under the headings in the commissioners' records.

"Ordered by the board that the following bills be allowed on the different funds as follows, to wit," including bills of C. C. Havird:

14. *Tabular Statement of Amounts Allowed C. C. Havird, a Sheriff.*

Quarter salary.

April 12th, 1887	300 00
July 11th, 1887	350 00
Oct. 10th, 1887	350 00
Jan. 9th, 1888	350 00
April 9th, 1888	362 00
Oct. 8th (6 mo.), 1888	724 00
Jan. 15th, 1889	362 00
	2,798 00

Boarding prisoners.

April 12th, 1887	
July 11th, 1887	7 50
Oct. 10th, 1887	18 75
Jan. 9th, 1888	10 00
April 9th, 1888	63 75
Oct. 8th (6 mo.), 1888	283 75
Jan. 15th, 1889	308 50
	692 25

14 Jailer's fees.

April 12th, 1887	225 00
July 11th, 1887	18 00
Oct. 10th, 1887	45 00
Jan. 9th, 1888	24 00
April 9th, 1888	153 00
Oct. 8th (6 mo.), 1888	543 00
Jan. 15th, 1889	294 00
	1,302 00

Collecting license.

April 12th, 1887	
July 11th, 1887	81 67
Oct. 10th, 1887	88 63
Jan. 9th, 1888	87 60
April 9th, 1888	82 41
Oct. 8th (6 mo.), 1888	206 91
Jan. 15th, 1889	48 00
	595 22

Transporting of prisoners.

April 12th, 1887	
July 11th, 1887	
Oct. 10th, 1887	19 00
Jan. 9th, 1888	
April 9th, 1888	
Oct. 8th (6 mo.), 1888	
Jan. 15th, 1889	137 15
	156 15

15 Collecting license, Territory.

April 12th, 1887	
July 11th, 1887	7 00
Oct. 10th, 1887	7 31
Jan. 9th, 1888	7 20
April 9th, 1888	7 29
Oct. 8th, 1888 (6 mo.)	17 72
Jan. 15th, 1889	5 33
	51 85

TERRITORY OF IDAHO, } ss:
County of Boisé, }

I, Wm. Warner, auditor in and for the county of Boisé, do hereby certify that the foregoing is true and correct.

In witness whereof I have hereunto set my hand and affixed my official seal the 8th day of February, 1890.

[SEAL.]

WM. WARNER,
Auditor, Boisé Co., I. T.

Objections of Def'ts to Above Evidence.

To which defendants objected on the grounds that such evidence was immaterial and irrelevant, in that it purported to show certain action taken by The Board of County Commissioners of Boisé County, defendant, on certain claims of plaintiff allowed by said board, and that it is inadmissable as any evidence whatever of the fact as to whether or not said board of county commissioners had ordered paid the claims or accounts of plaintiff and constituted no evidence that said board had not made such orders for pay-
16 ment to plaintiff of his allowances by said board; which objections were overruled by the court and said copies admitted as evidence; to which ruling defendants then and there duly excepted; which exceptions were allowed by the court.

Plaintiff then offered in evidence the opinion of the court, announced by Associate Justice Berry of said court, rendered at the January term, 1889, of said court, as follows:

Opinion of Justice Berry.

"In the Supreme Court of the Territory of Idaho. January Term, 1889.

THE PEOPLE OF THE UNITED STATES OF THE TERRITORY OF IDAHO *ex Rel.* JOHN GORMAN, Appellant,
vs.
C. C. HAVIRD, Respondent.

George Ainslee, att'y for appellant.
Huston and Gray, for respondent.

Proceedings in the Nature of Quo Warranto.

16. 1. An action under act of January 30th, 1885, to try title to an office to which there are several claimants is one of legal and not of equitable cognizance. The issues in such action or proceeding are legal ones, and the trial of such issues by a jury is a constitutional right of the parties.

2. That part of section 536, said act, providing that actions of this nature shall be tried by the judge of the district court at Cham-
17 bers, and without the intervention of a jury, is held unconstitutional and void.

This action is under an act of the territorial Legislature of Idaho, passed January 30th, 1885, being sections 534–542, inclusive, and its purpose to try the title of the respondent to the office of sheriff of Boisé county.

It has the usual provisions for obtaining jurisdiction of the parties, the formation of issues by pleading, the trial of those issues, and the rendition of judgment, with the further privilege of appeal to this court.

17. The proceeding is called by the act 'an action,' and it is so treated by both parties and it must be so considered for the purpose of this appeal. Its purpose, however, is to attain the end reached by a writ of *quo warranto* at common law or a writ of right for the king against him who improperly claimed or usurped an office. Such a writ is not suited to our form of government, and in America it has fallen into disuse, and statutory proceedings in the nature of a writ of *quo warranto* have in most of the States, if not in all, taken its place.

Those statutes vary in the extent of the remedy which they furnish. Some, as in Alabama, Stat. Ala., Feb'y 3, 1840, sec. 4, make of the court a mere inquisition to ascertain the regularity of the election. These have been held not to confer judicial power upon the court as in a suit at common law; hence that exercise of the right to hear and decide is rather in the character of supervisor of elections and do not require the intervention of a jury. In other States this statutory proceeding has approximated more nearly in its scope to the writ of *quo warranto*, still retaining the criminal form of the writ, but using it as a civil remedy only. In
18 our own Territory our Legislature has gone much further and includes within its act the full scope of an information in the nature of a writ of *quo warranto*, including its criminal features and power to punish. Such information in the nature of a writ of *quo warranto* was properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him or seize the office for the crown.

18 Paine on Elections, 710.

This law not only provides for the supervision of elections and the correction of errors, but it goes further and places in the court unmistakable judicial power. Section 541 provides 'that when a defendant against whom such action has been brought is adjudged guilty of usurping or intruding into or unlawfully holding any office, franchise, or privilege, judgment must be rendered that the defendant be excluded from the office, franchise, or privilege, and that he pay the cost of the action. The court or judge may also, in its or his discretion, impose upon the defendant a fine not exceeding two thousand dollars.'

Here are questions not merely as to the regularity of an election, but also of personal guilt or innocence, followed by pecuniary consequences of no small moment. It aims not only at a civil remedy, but also at a criminal trial, personal punishment, and pecuniary fine and loss. The act of wilful intrusion into a public office to which one has not been elected is declared to be a misdemeanor.

Rev. Stats. Idaho, sec. 6388.

19. The section of the act in question under which the dis-
19 trict judge, at chambers, assumed jurisdiction and tried this case is section 536, act of 1885, providing, among other things: 'And such action shall be heard and determined by the judge of the district court, at chambers, and without the intervention of a jury,

after due service of the summons, and at the expiration of time allowed by law for answering the complaint in a civil action, but no judgment shall be rendered in such action by default.'

This is an essential provision of the act, and without which the other provisions are inoperative. If this is unconstitutional, as respondent claims, the remedy under the act fails. This objection was taken by the respondent before the answer was filed. His exceptions to the ruling were then and there settled by the judge, and are incorporated as a part of the statement of the case on appeal. The respondent still stands upon such objection and exceptions in this court. It is true that the court upon the hearing found for the defendant, and that the defendant does not appeal, yet it is not easy to see, if the objection was valid when it was taken, how his failure to appeal from a finding in his favor, where he has all along and on appeal insisted on his objection, should be construed as a waiver of his exception. If, indeed, in any case it might be so waived, it cannot be so in this case, for the objection goes to the jurisdiction of the court, to the validity of the statute, and not merely to an irregularity. That is not subject to such waiver. If that part of the act is void the objection may be made at any time, even on appeal.

20. The grounds on which it is urged that this provision is unconstitutional are, 1st, that it denies the right of trial by jury;
20 2nd, that it creates a tribunal unknown and unauthorized by the laws.

Section 1868 of the Revised Statutes of the United States, as amended April 7th, 1874, prescribing and limiting the powers of territorial Legislatures, provides that 'no party shall be deprived of the right of trial be jury in cases cognizable by the common law.'

Again, the Constitution of the United States, art. 3rd, section 2nd: 'The trial of all crimes, except in cases of impeachment, shall be by jury.'

Again, *id.*, art. 5, amendments: 'No person shall be deprived of life, liberty, or property without due process of law.'

21. And again, *id.*, amendment 7: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'

There seems to have been a disposition in some States, under their own constitutions, to evade these provisions, whether of the United States or State constitutions, or such of them as clearly affect the case. Some courts have gone so far as to deny squarely that proceedings of this nature are of legal instead of equitable cognizance.

A Missouri case, State *ex rel.* Norton *vs.* Lupton, 27 Am. Reports, 253, so holds; but this case is met by the New York court of appeals in People *vs.* A. & S. R. Co. *et al.*, 57 N. Y., 161, in which case the court holds that an action in the nature of a *quo warranto* brought by the attorney general in the name of the people of the State to try the title to a corporate office to which there are several claimants is one of legal and not equitable cognizance; that the issues therein are strictly legal ones, and that the trial of such by a jury is the constitutional right of the parties.

21 The constitutional guaranty of the right of trial by jury

in that State goes no further than the provisions of the Federal Constitution and the act of Congress cited, section 1868, as amended and made especially to apply to our territorial Legislature; nor can the territorial Legislature pass any law in contravention of the Constitution or the laws of the United States. U. S. Rev. Stats., sec. 1851. In other cases, as in the State of Illinois, the statute itself only confers a supervisory power over the regularity of the election, and does not at all apply to much of the ground covered by the statute of Idaho.

A Louisiana court, in Joseph *vs.* Bidwell, 26 Am. Rep., 102, holds that the Federal Constitution in that respect can have no application to the State courts. Perhaps, as Louisiana is a sovereign State, that claim may be sustained. Other cases cited by the appellant hold the same; but we are not called upon to discuss that question. Idaho is not a State, but is a Territory of the United States, and in all things subject to the Constitution of the United States and the laws of Congress. Section 1868 of the Revised Statutes of the United States as amended seems to meet this case, and is conclusive. Even were this otherwise and the question arose under the common law which is adopted in this Territory, Rev. Stats., sec. 18, the weight of the authority is in favor of the construction given by the New York court of appeals in the case of that State above cited, but arising under the State constitution.

23. See also Reynolds *vs.* State, 61 Ind., 392.
People *vs.* Van Slyck, 4 Cowen, New York, 297.
People *vs.* Ferguson, 8 *id.*, 103.

22 But it is contended by the appellant that if the issues here are triable by jury, and the objection was or is properly taken, and for that reason the judgment should be reversed, still a new trial should be granted. The answer to this may be that the proceedings in the court below were under the act in question, and, if wrong, it is because that part of the act on which they are based is invalid and no valid judgment could be had; that, while the action in its present form cannot proceed, amendment changing its nature and purpose is not authorized by law. We are not called to decide that point. There is no intimation of a purpose to amend or change the proceeding in any way, even if allowable.

The term of office of the defendant expired in January, 1889, and we see no purpose which could not be reached by any proceeding of this nature.

24. All that part of section 536 of the act entitled 'An act to amend chapter 35 of the Code of Civil Procedure, being sections 534 to 542, inclusive,' approved January 30th, 1885, beginning at the words 'and such action,' in the fourth line thereof, to and including the words 'in a civil action,' in the eighth line thereof, must be declared unconstitutional and void, and the judgment herein must be reversed.

Judgment reversed."

To which defendants objected. The objection was overruled by the court and defendants excepted; which exception was allowed by the court.

Plaintiff then rested and defendants offered in evidence the record entry of the proceedings of said supreme court on March 19th, at its January term, 1889, which is as follows:

23 Supreme Court of Idaho Territory.

TUESDAY, *March 19th*, 1889.

Court met pursuant to adjournment—present, Hon. H. W. Weir, chief justice; Hon. John L. Logan, ass't justice; Hon. C. H. Berry, ass't justice, and the officers of the court—when the following proceedings were had:

THE PEOPLE, &c., *ex Rel.* JOHN GORMAN
vs.
C. C. HAVIRD. } Appeal, 2nd Dis., Boisé Co.

25. *Order of Court Denying Motion to Change Judgment.*

Weir, chief justice, and Logan, justice, reconsidering the granting of the motion granted herein March 18th, 1889, without notice, deny the motion, the opinion to stand "judgment reversed," and the case remanded to court below to proceed in such manner as it shall deem proper.

Ordered that this court do now adjourn *sine die*.

H. W. WEIR,
Chief Justice.

26. To which offer plaintiff objected. The objection was overruled by the court and said evidence admitted; to which ruling plaintiff then and there excepted, which exception was allowed by the court.

Defendants then offered in evidence certified copies of the remittitur sent from said supreme court down to the district court and of the record of said district court continuing the contested
24 election case of The People, &c., *ex rel.* John Gorman *vs.* Cary C. Havird until the next term of said court; which said certified copies so offered in evidence are as follows and admitted in evidence by the court:

Remittitur Sent to Court Below.

In the Supreme Court of the Territory of Idaho. January Term, A. D. 1890.

THE PEOPLE OF THE UNITED STATES OF TER. OF IDAHO *ex Rel.* JOHN GORMAN
vs.
C. C. HAVIRD.

On an Appeal from the District Court of the Second Judicial District in and for Boisé County.

And now, at this day, this cause being called and having — heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by —— ——- to the effect that the judgment of the court below be reversed.

27. Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the second judicial district in and for the county of Boisé in the above-entitled cause be, and the same is hereby, reversed, and the case is remanded to the court below to proceed in such manner as it shall deem proper.

I, S. H. Hays, clerk of the supreme court of the Territory of Idaho, do hereby certify that the foregoing is a true copy of an original judgment, as amended March 19th, 1889, entered in the above-entitled cause on the 11th day of March, A. D. 1889, and now remaining of record in my office.

[SEAL.]

25 Witness my hand and seal of the court, affixed at my office this 19th day of March, A. D. 1889.

[SEAL.] S. H. HAYS, *Clerk.*

TERRITORY OF IDAHO, } *ss:*
County of Boisé, }

I hereby certify the foregoing to be a true copy of the original remittitur on file in my office in the above-entitled action.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the seal of the district court this 13th day of February, A. D. 1890.

[SEAL.]

SOL. HASBROUCK,
Clerk Dist. Court,
By ISIDOR SMITH, *Deputy.*

28. Endorsed: In the supreme court, Territory of Idaho. Remittitur. The People *ex rel.* John Gorman *vs.* C. C. Havird.

(Certified copy.)

Record of Court Below.

In the District Court of the Second Judicial District of Idaho Territory in and for the County of Boisé. November Term, 1889.

Present: Hon. H. W. Weir, judge.

FRIDAY, *November* 22*nd*, 1889.

The following order was entered of record:

THE PEOPLE OF THE U. S., &c., *ex Rel.* JOHN GORMAN
vs.
C. C. HAVIRD.

26 *Continuance.*

Ordered that this cause be, and is hereby, continued until next term.

TERRITORY OF IDAHO, } *ss.*:
County of Boisé, }

I hereby certify that the foregoing is a true copy from the record of an order entered on the 22nd day of November, 1889.

Witness my hand and the seal of said court, affixed this 13th day of February, A. D. 1890.

[SEAL.] SOL. HASBROUCK, *Clerk*,
By ISIDOR SMITH, *Deputy*.

Endorsed: District court, Boisé county, Idaho Territory. The People *ex rel.* John Gorman *vs.* C. C. Havird. Certified copy from the record of an order entered Nov. 22d, 1889.

29. To the introduction of which severally the plaintiff objected. The objection was overruled, said copies admitted and received in evidence by the court; to which ruling plaintiff then and there duly excepted; which exception was allowed by the court.

Offer of Pl'ff to Show by Parol Testimony That a Certain Judgment Was Not a Record of Court.

The plaintiff in rebuttal offered and asked leave of the court to show by parol testimony that the following entry in the records of said supreme court under date of March 19th, 1889, to wit, "Weir, chief justice, and Logan, justice, reconsidering the granting of the motion granted herein March 18th, 1889, without notice, deny the motion, the opinion to stand 'judgment reversed' and the
27 cause remanded to court below to proceed in such manner as it shall deem proper," is not a record of said court; that said entry was dictated and made after the adjournment *sine die* of said January term, 1889, of said court; that it was made at a

place other than that where said court was held and while said court was not in session, without the knowledge, consent, or concurrence of one member of the court or of the parties to said action.

Which said offer was, on February 19th, 1890, denied by said court; to which ruling and decision of said court excluding such evidence plaintiff, by his counsel, then and there duly excepted, and which exception was allowed by the court.

30. Defendants then rested, and, the evidence being closed, the case was then argued by counsel and submitted to the court.

And thereafter, to wit, on February 24th, 1890, said court rendered and entered its judgment and decision therein as follows, to wit:

Judgment.

FEB'Y 24TH, 1890.

HAVIRD
v.
BOISÉ CO., GORMAN, Int.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court is delivered to the effect that the action now pending in the lower
28 court, entitled The Territory of Idaho *ex rel.* John Gorman *vs.* C. C. Havird be dismissed, and that a peremptory writ of mandate issue directing the defendant, The County Commissioners of Boisé County, to order the issuing of a warrant or warrants in the name of plaintiff herein for the amounts heretofore allowed by the said board during the time specified, on account of fees and expenses, and that immediately upon the dismissal of said action by said district court a writ of mandate shall issue commanding said commissioners to order the issuing of a warrant or warrants in the name of plaintiff herein for the amount due him as salary for the time specified.

It is so ordered by the court.

Thereafter, to wit, on February 28th, 1890, and during said term, said court amended said judgment as follows:

Amended Judgment.

BOISÉ CITY, IDAHO, *Feb. 28th*, 1890.

Supreme Court, Idaho Territory.

Court met pursuant to adjournment—present, Hon. James H Beatty, chief justice; Hon. C. H. Berry, associate justice; Hon. Willis

Sweet, associate justice, and the officers of the court—when the following proceedings were had:

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ CO., JOHN GORMAN, Intervenor.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and the premises being by the court
29 here seen, heard, understood, and fully considered, the opinion of the court is delivered by Mr. Justice Sweet to the effect that the action now pending in the second district court in and for Boisé Co., entitled The Territory of Idaho *ex rel.* John Gorman *vs.* C. C. Havird, should be dismissed, and that a writ of mandate forthwith issue under the seal of the clerk of this court, directing the defendant, The County Commissioners of Boisé Co., to order the issuing of a warrant or warrants in the name of the plaintiff herein for the amounts heretofore allowed by said board for the time specified, on account of fees and expenses, and that immediately upon the dismissal of said action by said district court a writ of mandate issue, under the seal of the clerk of this court, commanding said commissioners to order the issuing of a warrant or warrants in the name of the plaintiff herein for the amount due him as salary for the time specified, and that a copy hereof be certified to said district court.

It is so ordered by the court.

33. The said John Gorman, defendant and intervenor, having heretofore moved in open court that said court allow him an appeal from such judgment and decision of said court to the Supreme Court of the United States, the said supreme court of said Territory thereafter, to wit, on March 1st, 1890, being a day of said term, made and caused to be entered the following order granting such motion, viz:

Order Allowing Appeal to U. S. Supreme Court.

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, JOHN GORMAN, Intervenor.

30 And now, at this day, the application of the intervenor herein for the allowance of an appeal to the Supreme Court of the United States from the judgment heretofore rendered herein in this court was by the court granted upon the filing of a supersedeas bond in the sum of eight thousand dollars, and one week's time is given in which to file said bond.

The defendant and intervenor, John Gorman, having tendered a supersedeas bond herein, said court, on March 5th, 1890, being a day of said term of said court, made and caused to be entered the further order of said court as follows:

In the Matter of the Application — CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY & JOHN GORMAN, Intervenor.

34. Exceptions having been made to the bond on appeal to the Supreme Court of the United States offered herein, it is ordered that the return of the remittitur herein be stayed pending the approval of appellant's bond on the appeal *of* the Supreme Court of the United States, the said bond to be approved by the judge of the second judicial district, at Boisé City, and the entire proceedings are stayed herein pending the examination of the appellant's sureties by said judge, as aforesaid, upon the exceptions made to such sureties by respondent, and if said bond now on file be not approved that a new bond may be presented, subject to exceptions by respondent, for such approval, and when so offered shall be filed in this court. The time for examination and approval shall not extend beyond thirty days from the date hereof.

31 *Certificate of Chief Justice to Statement on Appeal.*

I hereby certify that the foregoing is a correct statement of the proceedings had in the above-entitled cause in the supreme court of Idaho Territory at the January term, 1890, thereof.

Given this 10th day of March, 1890.

JAMES H. BEATTY,
Chief Justice of Supreme Court of Idaho Territory.

Supersedeas Bond.

Know all men by these presents that we, John Garrecht, Peter Donahue, Thomas Carrigan, Samuel T. Davis, Robert K. Davis and George Ainslie, Ben. Willson, & W. A. Coughanour, are held and firmly bound unto Cary C. Havird in the full and just sum of eight thousand dollars, to be paid to the said Cary C. Havird, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at the January term, 1890, of the supreme court of Idaho Territory, in a suit depending in said court between Cary C. Havird, as plaintiff, and The Board of County Commissioners of Boisé County, Idaho Territory, and John Gorman, intervenor, were defendants, judgment was rendered against the said defendants, and

said intervenor, John Gorman, having made a motion in open court for the allowance of an appeal by him from the judg-
32 ment and decision of said court aforesaid to the Supreme Court of the United States, and such motion having been sustained and such appeal allowed by said supreme court of Idaho Territory:

Now, therefore, the condition of the above obligation is such that if the said defendant and intervenor, John Gorman, appellant, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN GARRECHT. [SEAL.]
PETER DONAHUE. [SEAL.]
THOMAS CARRIGAN. [SEAL.]
SAM. T. DAVIS. [SEAL.]
ROB'T K. DAVIS. [SEAL.]
GEO. AINSLIE. [SEAL.]
BEN. WILLSON. [SEAL.]
W. A. COUGHANOUR. [SEAL.]

TERRITORY OF IDAHO, } ss:
County of Boisé, }

Be it remembered that on this third day of March, A. D. 1890, before me, T. S. Hart, the probate judge of Boisé county, Idaho Territory, personally appeared John Garrecht, Sen., Peter Donahue, Thomas Carrigan, Samuel T. Davis, & Robert K. Davis, all of whom are personally known to me to be the persons named in and who subscribed their names to the above and foregoing bond, and they each severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein
33 stated.

[SEAL.] Witness my hand and seal of office, at Idaho City, the day and year first above written.

T. S. HART,
Probate Judge of Boisé County, Idaho Territory.

TERRITORY OF IDAHO, } ss:
County of Boisé, }

John Garrecht, Sen., Peter Donahue, Thomas Carrigan, Samuel T. Davis, & Robert K. Davis, being severally duly sworn, on oath depose and say, each for himself, that he is a resident and householder of the Territory of Idaho, and that he is worth the following sums, to wit:

He, the said John Garracht, Sen., the sum of five thousand dollars.

He, the said Peter Donahue, the sum of one thousand & five hundred dollars.

He, the said Thomas Carrigan, the sum of one thousand five hundred dollars.

He, the said Samuel T. Davis, the sum of one thousand five hundred dollars.

He, the said Robert K. Davis, the sum of one thousand five hundred dollars, over and above all his just debts and liabilities and exclusive of property exempt from execution.

JOHN GARRECHT.
PETER DONAHUE.
THOMAS CARRIGAN.
SAM. T. DAVIS.
ROB'T K. DAVIS.

34 [SEAL.] Subscribed and sworn to before me this 3rd day of March, A. D. 1890.

T. S. HART,
Probate Judge.

TERRITORY OF IDAHO, } ss:
County of Ada, }

38. This affiant, George Ainslie, being first duly sworn, on oath says that he is a resident and householder of the Territory of Idaho, and that he is worth the sum of twenty thousand dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

GEO. AINSLIE.

Subscribed and sworn to before me March 5th, 1890.
[SEAL.] S. H. HAYS, *Clerk.*

TERRITORY OF IDAHO, } ss:
County of Ada, }

Ben. Willson and W. A. Coughanour, sureties in the above and foregoing undertaking, being each duly sworn, on oath depose- and say-, each for himself and not one for the other, that he is a resident and householder within said Territory, and is worth the sum of eight thousand dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

W. A. COUGHANOUR.
BEN. WILLSON.

Subscribed and sworn to before me March 10th, 1890.
[SEAL.] JO. W. HUSTON,
Notary Public.

35 39. Endorsed: Supreme court of Idaho Territory. Jan'y term, 1890. Cary C. Havird, pl'ff, *vs.* The Board of County Commissioners, Boisé County, Idaho, & John Gorman, intervenor.

Approval of Bond.

Supersedeas bond.

The within bond having been accepted by pl'ff's att'y, and being by me considered sufficient, is this 10th day of March, 1890, by me approved.

JAMES H. BEATTY,
Chief Justice Supreme Court, Idaho Territory.

Waiver of Pl'ff's Att'y.

I hereby waive all exceptions to the within bond and sufficiency of the sureties.

JO. W. HUSTON,
Att'y for Pl'ff.

Filed March 21st, 1890.

SOL. HASBROUCK,
Clerk of Supreme Court.

36 In the Supreme Court of Idaho Territory. January Term, 1890.

Affidavit or Petition, Filed January 20th, 1890, by Cary C. Havird for a Writ of Mandate against the Board of County Commissioners of Boisé County, Idaho Territory.

In the Supreme Court of Idaho Territory. January Term, A. D. 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, Idaho Territory, Defendant.

In the matter of the application of Cary C. Havird for a writ of mandate against the Board of County Commissioners of Boisé County, Idaho Territory.

To the honorable supreme court of Idaho Territory:

The petition of Cary C. Havird respectfully shows—

That at a general election held in and for the county of Boisé, Idaho Territory, on the 2nd day of November, A. D. 1886, for the election of county officers, your petition- was duly elected to the office of sheriff of said Boisé county.

That afterwards and subsequent to his entry upon the duties of said office of sheriff of Boisé county, to wit, on the 11th day of January, 1887, an action was commenced, upon the relation
37 of one John Gorman, under the provisions of an act of the Legislative Assembly of Idaho Territory, approved January 30th, 1885, entitled "An act to amend chapter thirty-five of the Code of Civil Proceedure, being sections 534 to 542, inclusive."

That said action was tried before the judge of the district court of the district wherein said action was brought, as provided in said act of the Legislative Assembly.

That upon the trial of said action judgment was rendered in favor of your petitioner, the defendant in said action.

That the plaintiff in said action made a motion for a new trial therein, which motion was heard by the judge that tried said cause, and after a full hearing thereon said motion was, on the 5th day of January, 1888, overruled by said judge.

That from the judgment and decision of said district judge and from the said order overruling the motion for a new trial the said relator, John Gorman, appealed to the supreme court of this Territory.

That said cause came on for a hearing before the supreme court of this Territory at the January term, A. D. 1889.

That the said supreme court made and entered its judgment and order directing that said action be dismissed and all proceedings in said action be declared void.

Your petitioner further shows that during the years 1887 and 1888 he was the sheriff of said Boisé county; that he performed all the duties of such office during said years.

That the defendant, The Board of County Commissioners of said Boisé County, fixed the amount of the salary to be paid the sheriff of said county for said years, as required and provided by statutes of Idaho Territory.

That your petitioner has at each and every quarter during said years of 1887 and 1888 presented his claim for salary as the same became due and as fixed by the said Board of County Com-
38 missioners, defendant.

That said Board of County Commissioners (the defendant herein) found the amount of said claims so presented to be correct, but refuse to allow and order a warrant to be drawn on the county treasury for the same or any part thereof.

That your petitioner has duly demanded of the defendant the issuing and delivery to him of county warrants for his said salary for said years, which the defendant refused and still refuses to do.

That there is now due and owing to your petitioner from said Boisé county, for salary as sheriff for said years 1887 and 1888, the sum of $5,595.47.

That your petitioner has no plain, speedy, and adequate remedy in the ordinary course of law for the relief herein prayed for.

That your petitioner is the party beneficially interested herein.

Wherefore your petitioner prays this honorable court that a writ of mandate issue herein commanding the defendant to issue warrants of the said county to your petitioner, Cary Havird, for the sum of $5,595.47.

CARY C. HAVIRD.

Subscribed and sworn to before me this 18th day of January, 1890.

S. H. HAYS,
Clerk of District Court,
By ISIDOR SMITH,
Deputy Clerk.

39 Endorsed as follows:

Supreme court, Idaho Territory. January term, 1890. Cary C. Havird, plaintiff, *vs.* Board of County Commissioners of Boisé County, Idaho. Affidavit for writ of mandate. Filed Jan. 20th, 1890. S. H. Hays, clerk.

40 *Alternative Writ of Mandate, Dated 20th of January, 1890, Issued on said Affidavit or Petition.*

Supreme Court of Idaho Territory. January Term, 1890.

In the Matter of the Application of CARY HAVIRD for a Writ of Mandamus.

The Territory of Idaho to the Board of Commissioners of Boisé County, Greeting:

Whereas it manifestly appears to us by the affidavit of Cary Havird, the party beneficially interested herein, that there is justly due and owing to him from the county of Boisé the sum of five thousand five hundred ninety-five & $\frac{47}{100}$ dollars for and on account of his salary as the sheriff of said Boisé county for the years 1887 and 1888, which sum you, the said Board of Commissioners of said Boisé County, refuse to allow and pay, and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore we do command you that, immediately after the receipt of this writ, you do cause to be issued to the said Cary Havird warrants of said Boisé county upon the treasurer thereof for the said sum of five thousand five hundred ninety-five & $\frac{47}{100}$ (5,595.47) dollars, or that you show cause before this court, at the court-room thereof, in the capitol building at Boisé City, Idaho Territory, on the 31st day of January, 1890, at the opening of the court on that day, why you have not done so.

41 Witness the Hon. James H. Beatty, chief justice of Idaho Territory, at Boisé City, county of Ada, Territory of Idaho, and the seal of said court, this 20th day of January, 1890.

[SEAL.] S. H. HAYS, *Clerk.*

42 *Return of Service of Writ.*

In the Supreme Court of Idaho Territory. January Term, 1890.

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandamus.

Aron Straus, being duly sworn, deposes and says that he is and at all times mentioned herein was a citizan of the United States, over the age of 28 years, and not a party to the within application of Cary Havird for a writ of mandamus; that he received the within annexed writ of mandamus on the 22nd day of January, 1890, and personally served a certificate copy of the same upon Charles Mann, chairman of the Board of Commissioners of Boisé County, I. T., on the 22nd day of January, 1890, by delivering to said Charles Mann and leaving with him the said certified copy of said writ at Idaho City, Boisé county, I. T.

ARON STRAUS.

Subscribed and sworn to before me this 23rd day of Jan'y, 1890.

S. H. HAYS,
Clerk of District Court,
By ISIDOR SMITH, *Deputy.*

Endorsed as follows:

Supreme court of Idaho Territory. In the matter of the application of Cary Havird for a writ of mandamus. Alternative writ. Filed Jan. 25th, 1890. S. H. Hays, clerk.

43 *Demurror of Defendant to Petition or Affidavit.*

In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, Idaho Territory, Defendants,

In the matter of the application of Cary C. Havird for a writ of mandate against the Board of County Commissioners of Boisé County, Idaho Territory.

The defendants demur to the complaint filed herein and for grounds of demurrer allege—

I. That the court has no jurisdiction of the subject of the action.

II. That the complaint does not state facts sufficient to constitute a cause of action.

III. That it appears on the face of the complaint that the plaintiff has a plain, speedy, and adequate remedy in the ordinary course of law.

Wherefore defendants demand judgment for their costs.

RICHARD Z. JOHNSON,
Att'y Gen'l, and
GEO. AINSLIE,
Att'ys for D'f'ts.

44 Endorsed as follows:

Endorsed: Supreme court of Idaho Territory. January term, 1890. Cary C. Havird, plaintiff, *vs.* The Board of County Commissioners of Boisé County, Idaho Ter'y, def'ts. Demurrer. Filed Jan. 31st, 1890. S. H. Hays, clerk. R. Z. Johnson, att'y gen'l, and Geo. Ainslie, att'ys for d'f'ts.

BOISÉ CITY, IDAHO, *Feb. 3d*, 1890.

SUPREME COURT, *Idaho Territory,* } *ss:*

Court met pursuant to adjournment—present, Hon. James H. Beatty, chief justice; Hon. C. H. Berry, associate justice; Hon. Wil-

40 *Alternative Writ of Mandate, Dated 20th of January, 1890, Issued on said Affidavit or Petition.*

Supreme Court of Idaho Territory. January Term, 1890.

In the Matter of the Application of CARY HAVIRD for a Writ of Mandamus.

The Territory of Idaho to the Board of Commissioners of Boisé County, Greeting:

Whereas it manifestly appears to us by the affidavit of Cary Havird, the party beneficially interested herein, that there is justly due and owing to him from the county of Boisé the sum of five thousand five hundred ninety-five & $\frac{47}{100}$ dollars for and on account of his salary as the sheriff of said Boisé county for the years 1887 and 1888, which sum you, the said Board of Commissioners of said Boisé County, refuse to allow and pay, and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore we do command you that, immediately after the receipt of this writ, you do cause to be issued to the said Cary Havird warrants of said Boisé county upon the treasurer thereof for the said sum of five thousand five hundred ninety-five & $\frac{47}{100}$ (5,595.47) dollars, or that you show cause before this court, at the court-room thereof, in the capitol building at Boisé City, Idaho Territory, on the 31st day of January, 1890, at the opening of the court on that day, why you have not done so.

41 Witness the Hon. James H. Beatty, chief justice of Idaho Territory, at Boisé City, county of Ada, Territory of Idaho, and the seal of said court, this 20th day of January, 1890.

[SEAL.] S. H. HAYS, *Clerk.*

42 *Return of Service of Writ.*

In the Supreme Court of Idaho Territory. January Term, 1890.

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandamus.

Aron Straus, being duly sworn, deposes and says that he is and at all times mentioned herein was a citizan of the United States, over the age of 28 years, and not a party to the within application of Cary Havird for a writ of mandamus; that he received the within annexed writ of mandamus on the 22nd day of January, 1890, and personally served a certificate copy of the same upon Charles Mann, chairman of the Board of Commissioners of Boisé County, I. T., on the 22nd day of January, 1890, by delivering to said Charles Mann and leaving with him the said certified copy of said writ at Idaho City, Boisé county, I. T.

ARON STRAUS.

Subscribed and sworn to before me this 23rd day of Jan'y, 1890.

S. H. HAYS,
Clerk of District Court,
By ISIDOR SMITH, *Deputy.*

Endorsed as follows:

Supreme court of Idaho Territory. In the matter of the application of Cary Havird for a writ of mandamus. Alternative writ. Filed Jan. 25th, 1890. S. H. Hays, clerk.

43 *Demurror of Defendant to Petition or Affidavit.*

In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, Idaho Territory, Defendants,

In the matter of the application of Cary C. Havird for a writ of mandate against the Board of County Commissioners of Boisé County, Idaho Territory.

The defendants demur to the complaint filed herein and for grounds of demurrer allege—

I. That the court has no jurisdiction of the subject of the action.

II. That the complaint does not state facts sufficient to constitute a cause of action.

III. That it appears on the face of the complaint that the plaintiff has a plain, speedy, and adequate remedy in the ordinary course of law.

Wherefore defendants demand judgment for their costs.

RICHARD Z. JOHNSON,
Att'y Gen'l, and
GEO. AINSLIE,
Att'ys for D'f'ts.

44 Endorsed as follows:

Endorsed: Supreme court of Idaho Territory. January term, 1890. Cary C. Havird, plaintiff, *vs.* The Board of County Commissioners of Boisé County, Idaho Ter'y, def'ts. Demurrer. Filed Jan. 31st, 1890. S. H. Hays, clerk. R. Z. Johnson, att'y gen'l, and Geo. Ainslie, att'ys for d'f'ts.

BOISÉ CITY, IDAHO, *Feb. 3d*, 1890.

SUPREME COURT, *Idaho Territory,* } ss:

Court met pursuant to adjournment—present, Hon. James H. Beatty, chief justice; Hon. C. H. Berry, associate justice; Hon. Wil-

lis Sweet, associate justice—when the following proceedings, among others, were had, to wit:

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY.

This day the hearing of the cause was resumed, and now comes the petitioner and asks leave to file an amended petition, which leave was granted by the court, with the understanding that
45 if the amended petition raises a new issue defendant shall have a right to be heard further.

46 *Amended Affidavit or Petition of Plaintiff, Cary C. Havird, for a Writ of Mandate.*

In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, IDAHO, Defendant.

In the matter of the application of Cary C. Havird for a writ of mandate against the Board of County Commissioners of Boisé County, Idaho Territory.

Now comes the plaintiff above named and by leave of court files this his amended petition:

To the honorable supreme court of Idaho Territory:

The petition of Cary C. Havird respectfully shows—

That — a general election held in and for the county of Boisé, Territory of Idaho, on the 2nd day of November, A. D. 1886, for the election of county officers, your petitioner was duly elected to the office of sheriff of said Boisé county.

That afterwards, and subsequent to his entry upon the duties of said office of sheriff of said Boisé county, to wit, on the 11th day of January, 1887, an action was commenced upon the rela-
47 tion of one John Gorman, under the provisions of an act of the Legislative Assembly of Idaho Territory approved January 30th, 1885, entitled "An act to amend chapter thirty-five of the Code of Civil Proceedure, being sections 534 to 542, inclusive."

That said action was tried before the judge of the district court of the district wherein said action was brought, as provided in said act of the Legislative Assembly.

That upon the trial of said action judgment was rendered in favor of your petitioner, the defendant in said action.

That the plaintiff in said action made a motion for a new trial

therein, which motion was heard by the judge that tried said cause, and after a full hearing thereon said motion was, on the 5th day of January, 1888, overruled by said judge.

That from the judgment and decision of said district judge and from the said order overruling the motion for a new trial the said relator, John Gorman, appealed to the supreme court of this Territory.

That said cause came on for a hearing before the supreme court of this Territory at the January term, 1889.

That the said supreme court made and entered its judgment and order directing that said action be dismissed and all proceedings in said action be declared void.

Your petitioner further shows that during the years 1887 and 1888 he was the sheriff of said Boisé county; that he performed all the duties of said office during said years.

That the defendant, The Board of County Commissioners of said Boisé County, fixed the amount of the salary to be paid to the sheriff of said county for said years as required and provided by the statutes of Idaho Territory.

That your petitioner, during said years of 1887 and 1888, duly presented his claim for salary as sheriff of said county in the
48 amount as fixed by the said Board of County Commissioners, and also presented his claim for expenses incurred as such sheriff for said county, as the same became due, to the said Board of County Commissioners (the defendant herein) at its regular meetings during said years.

That said Board of County Commissioners found the amount due the petitioner upon said claim so as aforesaid presented, and allowed the same, but refused to order a warrant or warrants to be drawn on the county treasury for the amount so allowed or any part thereof.

That the said Board of County Commissioners (the defendant) found due and allowed as owing to your petitioner for services and expenses as sheriff for said years 1887 and 1888 the sum of five thousand five hundred ninety-five and $\frac{47}{100}$ ($5,595.47) dollars, as follows: For salary, as fixed by law, the sum of two thousand and seven hundred and ninety-eight ($2,798) dollars, and for expenses incurred as sheriff for said county the sum of two thousand eight hundred forty-seven and $\frac{47}{100}$ ($2,847.47) dollars, making in the aggregate the said sum of $5,595.47.

That there is now due and owing to your petitioner from said Boisé county for salary and expenses incurred as sheriff for said years the said sum of $5,595.47.

That your petitioner has at divers times during said years duly demanded of said Board of County Commissioners that an order be made directing the clerk of said board to issue to your petitioner warrants on the county treasury for the amounts so aforesaid found due and allowed him by said board, to do which defendant refused.

That on or about the 15th day of January, 1890, your petitioner again made a demand of the defendant for the issuing of warrants

on the treasury of said county for the full amount due him as theretofore allowed by said board, to wit, for the said sum of
49 $5,595.47; that the said Board of County Commissioners (this defendant) then and there refused to issue said warrants or any warrants whatever, and still refuses to do so.

That the said board then and there made and caused to be entered in the minutes of the proceedings of said board of said date, to wit, January 15th, 1890, the following order:

"In the matter of the demand served on the board by C. C. Havird, sheriff of Boisé county, Idaho, requesting the board to order the auditor to issue warrants due the said sheriff for the years 1887 and 1888, it is hereby ordered by the board that, as section 381 of the Revised Statutes of Idaho prohibits the issue of warrants to any officer when such office is contested, no action can be taken in the matter."

That your petitioner has no plain, speedy, and adequate remedy in the ordinary course of law for the relief herein prayed for.

That your petitioner is the party beneficially interested herein.

Wherefore your petitioner prays this honorable court that a writ of mandate issue herein, commanding the defendant to issue warrants to your petitioner on the treasury of said Boisé — for the said sum of $5,595.47.

C. C. HAVIRD.

Subscribed and sworn to before me this 3rd day of February, 1890.

S. H. HAYS, *Clerk.*

50 Endorsed as follows:

Supreme court of Idaho Territory. January term, 1890. Cary C. Havird, plaintiff, *vs.* Board of County Commissioners of Boisé County, Idaho, defendant. Amended affidavit for writ of mandate. Filed Feb. 3d, 1890. S. H. Hays, clerk.

BOISÉ CITY, IDAHO, *Feb. 5th*, 1890.

SUPREME COURT, *Idaho Territory*, } ss:

Court met pursuant to adjournment—present, Hon. James H. Beatty, chief justice; Hon. C. H. Berry, associate justice; Hon. Willis Sweet, associate justice—when the following proceedings, among others, were had, to wit:

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY.

On Feb. 5th, 1890, in the same matter the following record entry was made, to wit:

"This day the demurrer heretofore interposed by the defendant herein was by the court overruled; to which ruling defendant duly

excepted, and leave is given defendant until to-morrow morning in which to answer."

51 *Answer of the Board of County Commissioners of Boisé County to the Petition or Affidavit of Plaintiff.*

In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, Idaho Territory, Defendants.

In the matter of the application of Cary C. Havird for a writ of mandate against The Board of County Commissioners of Boisé County, Idaho Territory.

The above-named defendants, The Board of County Commissioners of Boisé County, Idaho Territory, for answer to the alternative writ of mandate issued and served herein—

Deny that there is due and owing to the relator, plaintiff, Cary C. Havird, from the county of Boisé the sum of five thousand five hundred ninety-five and $\frac{47}{100}$ dollars for and on account of his salary as the sheriff of said Boisé county for the years 1887 and 1888, and deny that any sum of money whatever on account of salary as sheriff for any time or for any purpose or on any account whatever is due and owing to the said Cary C. Havird from the said county of Boisé.

Deny that defendants, said Board of County Commissioners, refuse to allow any just or legal claim of said Cary C. Havird against said county of Boisé.

52 And for further answer in this behalf said defendants aver that at a general election held in the county of Boisé, in said Territory, on November 2d, 1886, the plaintiff, Cary C. Havird, and one John Gorman were candidates for the office of sheriff of said county, and as such were voted for by the electors and voters of said county; that the board of county commissioners of said county, sitting as a board of canvassers subsequent to such election, canvassed and counted the returns of votes cast at the various election precincts in said county at such election, and as a result thereof declared that the said Cary C. Havird had received a majority of all the votes cast at said election for said office of sheriff of Boisé county for the term of two years commencing on the first Monday in January, 1887, and caused a certificate of election to be issued and delivered to said Havird.

That afterwards, to wit, on or about the — day of April, 1887, the said John Gorman commenced an action against the said C. C. Havird contesting his election to said office of sheriff, which said action was subsequently heard before the judge of the district court of the second judicial district of said Territory in and for said county of Boisé; that said trial resulted in a judgment in favor of plaintiff,

Cary C. Havird, to the effect that at said election he, the said Havird, was duly elected sheriff of said county for the term aforesaid.

That a motion for a new trial in said action was made by the said John Gorman, which motion was overruled and denied by the judge of said court on or about January 5th, A. D. 1888.

That said John Gorman appealed to the supreme court of this Territory from the said judgment and decision of said judge of said district court and from the order overruling and denying
53 said motion for a new trial, and such appeal was heard and determined by said supreme court at its January term, 1889, and said supreme court at said term rendered and entered its judgment reversing the judgment rendered by the court or judge below and ordered the case remanded to the court below, to wit, said district court of the second judicial district in and for said Boisé county, for further proceedings, and said action by said John Gorman contesting the title of the said Cary C. Havird to the said office of the sheriff of said county for said term, to wit, the years 1887 and 1888, is still pending and undetermined in said court to which it was remanded as aforesaid by said supreme court and said action has not been finally determined.

And for further answer in this behalf defendants admit that the Board of County Commissioners of said Boisé County fixed the amount of salary to be paid the sheriff of said county for said years of 1887 and 1888, in accordance with and as required by law.

And defendants aver that at the regular meetings of said Board of County Commissioners, held quarterly, as provided by law, during the years 1887 and 1888 and during the term of said office of sheriff so contested, said board passed upon and allowed plaintiff's accounts for salary as such sheriff, due quarterly during such term, as the same became due, and ordered warrants drawn on the county treasurer of said county therefor, and provided for the issuing of the same.

Wherefore defendants pray to be hence dismissed and that they have judgment for their costs in this behalf expended.

RICHARD Z. JOHNSON, *Att'y Gen'l, and*
GEO. AINSLIE, *Att'ys for D'f'ts.*

54 TERRITORY OF IDAHO, } *ss:*
County of Boisé, }

This affiant, Charles Mann, being first duly sworn, on oath deposes and says: I am a member of the Board of County Commissioners of Boisé County, Idaho Territory, defendants in the above-entitled action, and am chairman of said board. I have heard read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, except as to those matters as are therein stated on my information or belief, and as to those matters affiant believes them to be true.

CHARLES MANN.

Subscribed and sworn to before me this 29th day of January, A. D. 1890.

S. H. HAYS,
Clerk of District Court,
By ISIDOR SMITH, *Deputy.*

Endorsed as follows:
In the supreme court of Idaho Territory. January term, 1890. Cary C. Havird, plaintiff, *vs.* Board of County Commissioners of Boisé County, Idaho. Answer. Filed Feb. 6th, 1890. S. H. Hays, clerk. R. Z. Johnson, att'y gen'l and Geo. Ainslie, att'ys for d'f'ts.

55 *Order of Court Permitting John Gorman to File Petition in Intervention.*

BOISÉ CITY, IDAHO, *Feb. 13th*, 1890.

SUPREME COURT, *Idaho Territory,* } ss:

Court met pursuant to adjournment—present, Hon. James H. Beatty, chief justice; Hon. C. H. Berry, associate justice; Hon. Willis Sweet, associate justice—when the following proceedings, among others, were had, to wit:

In the Matter of the Application of CARY C. HAVIRD for a Writ of Mandate
against
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY.

This day John Gorman was permitted to file his complaint in intervention herein, and petitioner, Cary C. Havird, is given until to-morrow in which to plead.

56 *Complaint of John Gorman, Intervenor.*

In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, IDAHO, Defendant.

In the matter of the application of Cary C. Havird for a writ of mandate against the Board of County Commissioners of Boisé County, Idaho Territory.

Now comes John Gorman and by leave of the court, first had and obtained, files this as his complaint in intervention in the above-entitled cause, and, as the grounds of his intervention, alleges that he has an interest in the matter in litigation as against both the plaintiff and the defendant, and more particularly as against the

plaintiff in said action or proceeding, and which said grounds of intervention are more specifically set forth as follows:

I. The said intervenor, John Gorman, denies that at the general election held in and for the county of Boisé, Territory of Idaho, on the 2d day of November, A. D. 1886, for the election of county officers the said plaintiff, Cary C. Haviird, was duly elected or in any way elected to the office of sheriff of said Boisé county.

Said intervenor alleges that subsequent to said election said board of county commissioners, acting as a board of canvassars
57 of said election, declared that the said plaintiff was duly elected and caused a certificate of election to be issued by the clerk of said board to the said plaintiff for said office of sheriff for the said term of two years, commencing on the first Monday of January, 1887.

That subsequent thereto said John Gorman, your intervenor, commenced an action in the district court of the second judicial district of said Territory in and for said county contesting said election of plaintiff as such sheriff for said term.

That said action was tried before the judge of said court and judgment rendered by said judge in favor of the plaintiff and against your intervenor, the said John Gorman, who was the relator plaintiff therein.

That subsequent thereto, as provided by law, said relator, John Gorman, the intervenor herein, made a motion for a new trial before the judge of said court, which motion was by the judge of said court overruled and denied on or about January 5th, A. D. 1888.

That your intervenor, the relator in said action, appealed to the supreme court of this Territory from the judgment and decision of said judge of said district court and from the said order of said judge overruling and denying said motion for a new trial in said action.

That said appeal was heard in said supreme court of this Territory at the January term, 1889, thereof, and the final judgment and order of said supreme court, at its term aforesaid, made and entered, *was* reversing the judgment of the district court, a judge of the court below, and ordering said action or cause remanded to the court below, to wit, the said district court of the second judicial district of said Territory in and for the said county of Boisé, for further
58 proceedings therein.

That in accordance with said judgment and order of said supreme court a remittitier was issued under the seal of said supreme court, duly attested by the clerk thereof, directed to said district court in and for said Boisé county, and which was duly received and filed by the clerk of said district court.

That said action, in which said judgment of reversal was so made by said supreme court, and which was so ordered by said supreme court remanded to the court below as aforesaid for further proceedings, and in which your intervenor as relator in such action contests the right and title of said plaintiff herein to the said office of sheriff of said Boisé county for said term, is still pending and unde-

termined in said district court to which it was remanded by this court as aforesaid, and said action has not been finally determined.

Said intervenor, on his information and belief, denies that the said supreme court, at its January term, 1889, or at any other term, made or entered any judgment or order directing the said action so appealed to said court as aforesaid be dismissed, or that all proceedings therein be declared void; but, on the contrary, made and caused to be entered its judgment and order reversing the judgment of the judge or court below and remanding the case to the court below for further proceedings, as hereinbefore stated.

Intervenor herein claims and avers that at said election in said Boisé county on November 2d, 1886, he, the said John Gorman, received a majority of all the legal votes cast at said election for said office of sheriff of said county, and that he and not the plaintiff herein was duly elected to said office for said term of two years commencing on the first Monday of January, 1887, and as
59 such that he is entitled to the salary and fees and emoluments of said office for said term.

Wherefore intervenor demands judgment—

1st. That plaintiff take nothing by his said suit.

2nd. That the alternative writ of mandate issued herein be discharged.

3rd. That the intervenor recover his costs herein.

GEO. AINSLIE,
Att'y for John Gorman, Intervenor.

TERRITORY OF IDAHO, } ss:
County of Ada, }

This affiant, John Gorman, being first duly sworn, on oath says he is the intervenor in the foregoing complaint in intervention; that he has heard the same read and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters as are therein stated on his information or belief, and as to those matters affiant believes them to be true.

JOHN GORMAN.

Subscribed and sworn to before me Feb. 10th, 1890.

S. H. HAYS, *Clerk.*

60 Endorsed as follows:

Supreme court, Idaho Territory. January term, 1890. Cary C. Havird, plaintiff, — The Board of County Commissioners of Boisé County, Idaho Territory, defendants. Complaint of John Gorman, intervenor. Filed Feb. 13th, 1890. S. H. Hays, clerk. Geo. Ainslie, att'y for intervenor.

61 *Motion of Plaintiff to Strike Out Portions of Intervenor's Complaint.*

In the Supreme Court of Idaho Territory. January Term, 1890.

In the Matter of the Application of C. C. HAVIRD for a Writ of Mandamus
against
THE BOARD OF COMMISSIONERS OF BOISÉ COUNTY.

The plaintiff comes and moves the court to strike from the complaint of John Gorman, intervenor herein, all of said complaint contained within the last five lines upon the first page of said complaint, commencing with the words "the said intervenor," and the first three lines on the second page of said complaint, ending with the words "sheriff of said Boisé county;" also so much of said complaint as is contained between the tenth line, on the fourth page of said complaint, commencing with the words "said intervenor," and the first three lines on the fifth page of said complaint, ending with the words "said office for said term," for the reason that the same is irrelevant and redundant.

HUSTON & GRAY,
Att'ys for Pl'ff.

62 Endorsed as follows:
Supreme court, Idaho Territory. C. C. Havird, plaintiff, *vs.* Board of County Commissioners of Boisé County. Motion to strike out portion of intervenor's complaint. Filed Feb. 14th, 1890. S. H. Hays, clerk. Huston & Gray, for pl'ff.

63 *Answer of Cary C. Havird, Plaintiff, to the Complaint of John Gorman, Intervenor.*

In the Supreme Court of Idaho Territory. January Term, 1890.

CARY C. HAVIRD, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BOISÉ COUNTY, IDAHO, Defendant.

In the matter of the application — Cary C. Havird for a writ of mandate against the Board of County Commissioners of Boisé County, Idaho Territory.

The plaintiff herein, for answer to the complaint in intervention of John Gorman filed herein—

I.

Denies that said John Gorman, intervenor herein, subsequent to the action of the said defendant while acting as a board of canvassars of the election held in and for said Boisé county on the 2nd day of

November, A. D. 1886, declaring the plaintiff duly elected sheriff of said county, which election is mentioned and referred to in the complaint of said intervenor, commence- an action in the district court of the second judicial district of said Territory in and for said Boisé county contesting said election of plaintiff as sheriff for said term.

64 But plaintiff alleges that the said John Gorman, intervenor, as relator, commenced an action under the provisions of an act of the Legislative Assembly of Idaho Territory, approved January 30th, 1885, entitled "An act to amend chapter 35 of Code of Civil Proceedure, being sections 534 to 542, inclusive," to contest said election of plaintiff as sheriff of said county, which said action was tried, as provided in said act, and decided in favor of the plaintiff in this proceeding.

II.

Plaintiff denies that the supreme court of this Territory, at the January term, 1889, or ever, by its final judgment and order, reversed the judgment of the district judge in said action of John Gorman, relator, against said Cary C. Havird, contesting said election of said Cary C. Havird to the office of sheriff of said Boisé county, and ordered said action to be remanded to the court below, to wit, the said district court of the second judicial district of said Territory in and for said Boisé county, for further proceedings therein.

But plaintiff alleges that this court, at said term, made and entered its judgment and order dismissing said action.

III.

Plaintiff denies that said action in which said John Gorman (intervenor), as relator, contested the election of the said Cary C. Havird (this plaintiff) to the office of sheriff of Boisé county as aforesaid for the years 1887 and 1888 is still pending and undetermined in said district court for said Boisé county or in any other court.

Wherefore plaintiff prays that the said intervenor take nothing by his complaint, and that plaintiff have judgment for his costs herein.

HUSTON & GRAY,
Att'ys for Pl'f.

65 TERRITORY OF IDAHO, } ss:
County of Ada, }

Cary C. Havird, being duly sworn, says that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge, except matters therein stated to be upon his information and belief, and as to those matters he believes it to be true.

C. C. HAVIRD.

Subscribed and sworn to before me this 14th day of February, 1890.

S. H. HAYS, *Clerk.*

Endorsed as follows:

Supreme court, Idaho Territory. Cary C. Havird, plaintiff, *vs.* Board of County Commissioners of Boisé County, Idaho, defendant. Answer of Cary C. Havird, pl'ff, to the complaint of John Gorman, intervenor. Filed Feb. 14th, 1890. S. H. Hays, clerk. Huston & Gray, att'ys for plaintiff.

66 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the State of Idaho, Greeting:

Seal of the Supreme Court of the United States.

Whereas in a certain suit in the supreme court of the Territory of Idaho between Cary C. Havird, plaintiff, and The Board of County Commissioners of Boisé County, Idaho Territory, defendant, wherein John Gorman was intervenor, which suit was removed to the Supreme Court of the United States by virtue of an appeal taken by the said John Gorman agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That by mistake the following documents and parts of the record in the said case have been and are omitted from the transcript in the case which was certified and filed in the case in the appeal taken to this court by the said appellant, John Gorman, namely:

1. Petition filed January 20, 1890, by Cary C. Havird, plaintiff below, in said case against the Board of County Commissioners of Boisé County, Idaho, and John Gorman, intervenor, defendants.

2. The alternative writ of mandate issued out of and under the seal of the said court January 20, 1890, commanding and requiring the said Board of County Commissioners to cause to be issued to the said Havird warrants of said county upon the treasurer thereof for $5,595.47 or show cause before the said court, on the 31st of January, 1890, why the said board have not done so.

3. The demurrer filed by the defendants to the petition of said plaintiff.

4. The application, filed February 3, 1890, by plaintiff for leave to file an amended petition.

5. Copy of said amended petition of said plaintiff so filed on leave of court.

6. Order and ruling of court, February 5, 1890, overruling the said demurrer, together with a copy of the exceptions to the last-named ruling.

67 7. The answer of the Board of County Commissioners to the petition and affidavit of plaintiff, filed February 6, 1890.

8. Copy of order of court granting leave to John Gorman to file intervening petition.

9. Copy of verified complaint or answer of said John Gorman, intervenor, filed February 13, 1890.

10. Copy of exceptions taken to the granting of said last-named leave.

11. Copy of motion of said plaintiff, Havird, filed February 14, 1890, to strike out parts of the said intervening complaint of said Gorman.

12. Copy of answer filed by Havird to said complaint of Gorman.

13. Copies of each pleading, motion, order, decree, or other proceeding which was had in the case of The People of the United States of the Territory of Idaho *ex rel.* John Gorman *v.* C. C. Havird, defendant, in the nature of *quo warranto*, in the district court of the second district of Boisé county, Idaho Territory, and also in the supreme court of the Territory upon the appeal of said case, and which documents were in fact put in evidence in the above-entitled cause of Havird *v.* Board of County Commissioners *et al.*, and which documents so put in evidence do not appear in the transcript in the above-entitled case of Gorman, appellant, *v.* Havird, as now on file in the Supreme Court of the United States."

68 You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 1st day of April, A. D. 1891.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

69 STATE OF IDAHO, } ss:
County of Ada, }

I, the undersigned, Sol. Hasbrouck, clerk of the supreme court of the State of Idaho, do hereby certify that I received the foregoing and within writ of certiorari on the 20th day of April, 1891, and in obedience thereto that, searching the records and proceedings in said cause, the foregoing 65 pages are a true and correct transcript in said action, and contains—

First. The petition or affidavit filed January 20th, 1890, by Cary C. Havird, plaintiff, in said case against the Board of County Commissioners of Boisé County, Idaho.

Second. The alternative writ of mandate, issued out of and under the seal of said supreme court of Idaho January 20th, 1890, commanding and requiring the said Board of County Commissioners to cause to be issued to the said Havird warrants of said county upon the treasurer thereof for $5,595.47, or show cause before the said court on the 31st of January, 1890, why said board have not done so.

Third. The demurrer filed by the defendants to the petition of said plaintiff.

Fourth. The application filed or made February 3d, 1890, by plaintiff for leave to file an amended petition.

Fifth. Copy of said amended petition of said plaintiff so filed on leave of court.

Sixth. Order and ruling of court Feb. 5th, 1890, overruling the said demurrer.

Seventh. The answer of the Board of County Commissioners to the petition and affidavit of plaintiff filed Feb. 6th, 1890.

70 Eighth. Copy of order of court granting leave to John Gorman to file intervening petition.

Ninth. Copy of verified complaint or answer of said John Gorman, intervenor, filed Feb. 13th, 1890.

Eleventh. Copy of motion of said plaintiff, Havird, filed Feb. 14th, 1890, to strike out parts of the said intervening complaint of said Gorman.

Twelfth. Copy of answer filed by Havird to said complaint of Gorman.

Thirteenth. Copy of each pleading, motion, order, record entry, order, decree, or proceeding which was had in the case of The People of the United States of the Territory of Idaho *ex rel.* John Gorman *vs.* C. C. Havird, defendant, in the nature of *quo warranto* in the district court of the second district in and for Boisé county, Idaho Territory, and also in the supreme court of said Territory upon the appeal of said case, which documents were in fact put in evidence in the above-entitled cause of Havird *vs.* Board of County Commissioners *et al.*, and which documents so put in evidence do not appear in the transcript in the above-entitled case of Gorman, appellant, *v.* Havird, as now on file in the Supreme Court of the United States.

Also a true and correct copy of the statement of the case and of the proceedings had in said cause in the supreme court of Idaho Territory at the January term, 1890, thereof as allowed, settled, and signed on March 10th, 1890, by Hon. James H. Beatty, then chief justice of the supreme court of said Idaho Territory, consisting of the record of the Board of County Commissioners of Boisé County,

71 the record of the district court of the second judicial district, and the record of the supreme court of Idaho, and also the supersedeas bond on appeal and the approval of the same.

I do further certify that no bills of exceptions were written up, signed, or filed in said action in the supreme court of Idaho at the said January term, 1890, and that all exceptions taken or saved by either plaintiff, defendant, or intervenor upon such trial at said term were verbal exceptions, noted in the minutes of the court, copies of which minutes are embraced in the foregoing transcript; and that no other evidence, documentary, record, or otherwise, than as contained in the foregoing transcript was introduced upon the trial of said action of mandamus of C. C. Havird *vs.* The Board of County Commissioners and John Gorman, intervenor, in said supreme court of Idaho Territory at said term, as appears from the files in said action and the records and proceedings of said court now in the office of the clerk of the supreme court of the State of Idaho.

Supreme Court Seal, Idaho Territory.

Witness the Hon. Isaac N. Sullivan, chief justice of the supreme court of the State of Idaho, the 11th day of May, 1891.

SOL. HASBROUCK,
Clerk of the Supreme Court of the State of Idaho.

[Endorsed:] Supreme Court U. S. 1890, October term. No. 1296. John Gorman, appellant, *vs.* Cary C. Havird. Writ of certiorari and return.

[Stamped:] Office Supreme Court U. S. Filed May 19, 1891. James H. McKenney, clerk.

FILED
MAR 23 1891
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 1296.

JOHN GORMAN, APPELLANT,

vs.

CARY C. HAVIRD.

Now comes the appellant in the above-entitled cause, John Gorman, intervenor, through his counsel, and here suggests a diminution of the record in the above-entitled cause, and prays that a writ of certiorari may issue from this court in such case to the Clerk of the Supreme Court of the late Territory of Idaho, at Boise City, Idaho, to wit, to Sol. Hasbrouck, Clerk, or to such successor of said clerk, if any there be, as is now the lawful custodian of the records in said case.

And for grounds for said motion, the said appellant assigns the following: That, by mistake, the following documents and parts of the record in the said case have been, and are, omitted from the transcript in the case which was certified and filed in the case in the appeal taken to this court by the said appellant, John Gorman, namely:

1. Petition filed, January 20, 1890, by Cary C. Havird, plaintiff below in said case, against the Board of County Commissioners of Boise county, Idaho, and John Gorman, intervenor, defendants.

2. The alternative writ of mandate issued out of and under the seal of the said court January 20, 1890, com-

manding and requiring the said Board of County Commissioners to cause to be issued to the said Havird warrants of said county upon the treasurer thereof for $5,595.47, or show cause before the said court on the 31st of January, 1890, why the said Board have not done so.

3. The demurrer filed by the defendants to the petition of said plaintiff.

4. The application filed February 3, 1890, by plaintiff for leave to file an amended petition.

5. Copy of said amended petition of said plaintiff so filed on leave of court.

6. Order and ruling of court, February 5, 1890, overruling the said demurrer, together with a copy of the exceptions to the last-named ruling.

7. The answer of the Board of County Commissioners to the petition and affidavit of plaintiff, filed February 6, 1890.

8. Copy of order of court granting leave to John Gorman to file intervening petition.

9. Copy of verified complaint or answer of said John Gorman, intervenor, filed February 13, 1890.

10. Copy of exceptions taken to the granting of said last-named leave.

11. Copy of motion of said plaintiff, Havird, filed February 14, 1890, to strike out parts of the said intervening complaint of said Gorman.

12. Copy of answer filed by Havird to said complaint of Gorman.

13. Copies of each pleading, motion, order, decree, or other proceeding which was had in the case of the People of the United States of the Territory of Idaho *ex rel.* John Gorman *v.* C. C. Havird, defendant, in the

nature of *quo warranto*, in the district court of the second district of Boise county, Idaho Territory; and also, in the Supreme Court of the Territory, upon the appeal of said case; and which documents were, in fact, put in evidence in the above-entitled cause of Havird *v.* Board of County Commissioners *et al.*, and which documents so put in evidence do not appear in the transcript in the above-entitled case of Gorman, appellant, *v.* Havird, as now on file in the Supreme Court of the United States.

SAMUEL SHELLABARGER,
J. M. WILSON,
Attorneys for Appellant.

No. 1296.

In the Supreme Court

of the United States.

JOHN GORMAN, Appellant,

vs.

CARY C. HAVIRD.

MOTION FOR CERTIORARI.

Received Copy and Waive Affidavit.

JOHN GOODE,

Attorney for Appellee.

March 10, 1891.

SAMUEL SHELLABARGER,

J. M. WILSON,

Attorneys for Appellant.

Office Supreme Court U. S.
FILED,
MAR 4 1891
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

JOHN GORMAN, Appellant,
vs.
CARY C. HAVIRD.
No. 1296.

Appeal from the Supreme Court of the Territory of Idaho.

Brief for Appellant in Resistance of Motion to Dismiss and Affirm.

FACTS.

This action is mandamus, and was commenced January 20, 1890, in the Supreme Court of the Territory of Idaho, commanding the county commissioners of Boise county, Idaho, to issue warrants on the treasury for $5,595.47, for amounts alleged to be due to appellee, Havird, for salary and expenses as sheriff for the years 1887 and 1888. (R., 1.)

The County Board filed their answer and affidavit February 6, 1890, and on the 13th of February, 1890, the appellant, Gorman, filed his intervening petition, on leave of the Court, demanding and claiming said amount sued for by Havird, to wit, $5.595.47. (R., 1.)

To this Havird filed a motion to strike out parts of the intervening petition, and also filed an answer. (R., 1 and 2.)

Trial was had on the 17th of February, 1890, and the case was proceeded with, the parties introducing as evidence in the case the records of a case in the nature of *quo warranto* that had been begun in the District Court of the second district, by the People *ex rel.* John Gorman, the intervenor in the present case, against Havird, in which case Gorman claimed the office of sheriff, held by Havird, who was alleged to be a usurper. (R., 1 and 2.)

In this proceeding, on the part of the People on the Relation of German against Havird, so offered in evidence in the mandamus suit begun by Havird, January 20, 1890, the following orders or judgments were rendered:

In the Supreme Court of the Territory, on appeal of said *quo warranto* case from the District Court, on the 11th of March, 1889, a judgment was rendered, reversing the judgment of the District Court, which judgment of the District Court had been in favor of the relator, Gorman. (R., 2.)

On the 18th of March, 1889, the Court in such *quo warranto* case amended its judgment so rendered, reversing the judgment of the District Court, so as to direct that the word "reversed" should be struck out, and directing the appeal to be hereby dismissed. (R., 2 and 3.)

On the 19th of March, 1889, in the same *quo warranto* case, the Supreme Court made the order "that the judgment of the District Court of the second judicial district in and for the county of Boise, in the above-entitled case, be, and the same is hereby, reversed, and *the case is remanded to the Court below, to proceed in such manner as it shall deem proper.*" (R., 13 and 14.)

This is the last and final judgment rendered in the contested election or *quo warranto* case, the record of which was so offered in evidence in the mandamus case now here pending on the appeal of the intervenor, Gorman.

Under this order of the Supreme Court of the Terri-

tory (R., 14), so remitting the case below, the case went back to the Court below, and was entered of record, and was, on the 22d of November, 1889, in the Court below, continued. (R 14.)

This remittitur was also introduced, in the mandamus case of Havird, as evidence.

Thereupon the Supreme Court, in the mandamus case, on the 24th of February, 1890, rendered the judgment found (Record, pp. 15 and 16), and that judgment is brought into this Court by the present appeal.

It will be seen that the said final decree (R., 16, fol. 31 and 32) first directs "that the action now pending in the lower Court," (to wit, that sent back by a remittitur, found page 13 of the Record, and which was continued from time to time, as appears on page 14 of the record, being the contested election case in the nature of *quo warranto*,) entitled "the Territory of Idaho, *ex rel.* John Gorman against C. C. Havird, be dismissed, and that a peremptory writ of mandate issue directing the defendant, the County Commissioners of Boise County, to order the issuing of a warrant or warrants in the name of the plaintiff for the amounts heretofore allowed by the said Board during the time specified, on account of fees and expenses, and that immediately upon the dismissal of the said action by the said District Court a writ of mandate shall issue commanding the Commissioners to order the issuing of a warrant or warrants in the name of the plaintiff herein for the amount due him as salary for the time specified."

The amount for which the warrants had been allowed and which this judgment directs warrants to be issued for is stated in tabulated form on page 8 of the record, and aggregates $5,595.47, as is also stated in the second page of the brief in support of the motion to dismiss and affirm.

Under this state of facts the appellant submits, in re-

sistance of the said motion to dismiss and affirm, the following propositions of fact and law:

BRIEF.

1. On the point that this Court has not jurisdiction because "the matter in dispute does not exceed the sum or value of $5,000," we state as follows:

The amount sued for by Havird in this case is, as shown by the record (R., 1), $5,595.47. The amount thereof contested or disputed by the intervener is the *whole* of said sum so claimed. Such being the issue, the matter in dispute is, of course, the amount claimed by the complainant. The jurisdictional amount in this case is determined and fixed by the judgment or decree appealed from, which, in this case, was the whole amount for which the Supreme Court ordered the issuing of warrants in the name of the plaintiff, to wit, "for the amounts heretofore allowed by the said Board," (R., 16 and 8,) being $5,595.47.

This is determined by an endless number of cases.

Take, for example, the case of Railroad Company *vs.* Bank, 118 U. S., 608, 609, and the cases there cited.

2. The contention of the appellee, that the jurisdictional amount is not in controversy, owing to the fact that $1,994.25 thereof (Brief, p. 3) was for boarding prisoners and jailer's fees, is not tenable. The rule of law regarding the right to reduce the amount sued for, owing to the fact that a portion thereof is not disputed, has no application here. The cases cited in the brief (p. 4) are *all* cases where the appealing party, in effect, *admitted*, in some form, *or did not contest*, such a portion of the claim sued for, or defended against (as the case might be), as, when subtracted, reduced the matter in controversy below $5,000. This is not that case. The appellant admits the complainant's title to *no* part of the

$5,595.47, but claimed the whole and "disputed" the appellee's right to any part thereof.

The contention in the opposing brief (p. 3), that the said aggregate of $1,994.25 having been necessarily expended by the appellee in administration of the office, "could not possibly be recovered from him in any legal proceeding," and therefore was not in "dispute," is simply an assertion, not that the claim was not in dispute, but that the claim was untenable in law, and manifestly so. This only shows a case for defeating the party so contending for the entire $5,595.47; and is not a case removing any part of the said $5,595.47 from the category "matter in dispute."

It is thoroughly settled that *until it is, in some way, shown by the record that the sum demanded in the pleadings is not in dispute, the sum demanded will govern.*

See I Wall., 337, 339; 93 U. S., 241; *id.*, 564; 100 U. S., 6; 102 U. S., 121; 108 U. S., 174; 115 U. S., 613.

The language of the Court in this last-cited case of Bowman *v.* Railway Company, 115 U. S., 613, on this point is:

"As was stated in Hilton *v.* Dickinson (108 U. S., 165), *it is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction,*" &c.

What is pointed out in the opposing brief (p. 3) regarding the $1,994.25 is not an attempt to show that it was not "in dispute," nor that the *record shows* that it was not in dispute, but is a mere asseveration that it could not be successfully claimed by Gorman; this because Havird had the better right to it. It is a mere contention, not that Gorman did not sue for it and "dispute" Havird's right to it, but only that Gorman had no valid claim to the $1,994.25.

3. But we submit that even this last is not true, pro-

vided Gorman was entitled to the office. It is impossible, as seem to us, on principle, to successfully contend that an usurper of an office who is dealt with by the law as a criminal is *any more* entitled to the *allowance for jailer's fees or the allowance for boarding prisoners*, which allowances were made by law and paid by the county to the usurper, than is the usurper entitled to the *salary* of the man whose office he usurped. For the salary, as much as for the keep of prisoners, has the *de facto* officer paid out value.

The case of The People *ex rel.* Benoit *v.* Miller, 24 Mich., 458, decided 1872, by Cooley, Graves and Campbell (see Sedgwick's Leading Cases on the Measure of Damages, 711–714), is one where the Court held what is thus stated in the syllabus:

"One kept out of a profitable public office by an unlawful intruder is entitled to recover as damages the whole official salary, without deduction either for the services of the incumbent or for the plaintiff's profitable use of the time during which he was kept out."

Benoit was the rightful county treasurer; Miller was the usurper. Miller became treasurer *de facto*. The Court (p. 714) says:

"No rule of law permits one to make another his debter in spite of his protest and against his will. There are some cases where the law raises an implied assumpsit though there had been no express agreement, but *none* where it could be raised in favor of a naked tresspasser. The money which Miller received from the county was paid him because he was an officer *de facto*, and as the *perquisites of office*, and not for *private* services independent of *official character*. Having received it as *official property* he must restore it as such. An intermeddler might as well charge a commission on rents collected of tenants without authority from the landlord, as an intruder into office claim pay for his personal services from the legal officer whom he has kept out. Miller's services were not rendered with any design for benefiting Benoit. He can-

not now assume the position that he was an agent, or servant, or benefactor. Where there are no relations there are can be no duties and no claim for services."

Just so here: what Havird received for board of prisoners and as the "allowed" salary of the jailer (R., 4, fol. 7) were official perquisites, and not payments for private services; and hence the usurper cannot retain these.

There is, therefore, here no want of jurisdiction on account of the matter in dispute being less than $5,000; nor do the facts pointed to in the brief make out *any color of want of jurisdiction.*

4. The only other point which need here be introduced is as to whether the appeal is "*frivolous.*"

We submit that, so far from being frivolous, the error of the Court below is palpable. The Supreme Court of Idaho had, in the *quo warranto* case (R., 13), reversed the judgment in favor of Gorman, of the District Court, and had sent that case back by a remittitur to said District Court, and had ordered the District Court to proceed therein in such manner as it should deem proper. This was done in a final judgment of that Supreme Court of date March 19, 1889 (R., 13, 14); and the case had, moreover, gone back, under said remittitur; had been entered upon the docket of the District Court, and had been once or twice there continued, as, for example, on the 22d of November, 1889 (R., 14.) And when the case was thus so pending in the District Court, under a judgment and order of the Supreme Court of date 19th of March, 1889 (R., 13, 14), the Supreme Court undertakes thereafter, to wit, upon the 28th day of February, 1890, eleven months and nine days after the order of remittitur, to reverse a judgment which it had rendered in a former term of the Court. Not only does it attempt to reverse (R., 15, 16, fols. 30, 31)

its judgment of a former term, to wit, of 19th of March, 1889 (R., 14), after it has gone back and is pending in the Court below, but it makes this reversal in *a different case from that which it reverses, and a case that is not pending in the Supreme Court, but is pending, by its own final judgment, in a Court below.*

This reversal of itself by the Supreme Court, and order to dismiss the action in the District Court (R., 16), seems to have been resorted to because of the requirements of section 380 of the Revised Statues of Idaho, named in the opposing brief (pp. 4 and 5), which prohibited the issuing of any warrant for pay in favor of the incumbent of the office until the proceedings contesting his office were finally determined.

This change, whether it is called a reversal of its judgment of March 19, 1889, or an amendment of that judgment, or whatever else, was still beyond the power of the Court.

This Court has decided that such change cannot be made at a subsequent term, in cases reported in the following volumes of this Court's decisions: 12 Wall., 121; 7 Cranch, 1; 3 Wheat., 591; 12 Peters, 488; 6 How., 31; 14 How., 25; 18 How., 507; 91 U. S., 149; 102 U. S., 107; 104 U. S., 410; 107 U. S., 629; 117 U. S., 655.

If, therefore, the Supreme Court had not jurisdiction to reverse its judgment in the *quo warranto* case, (R., 13, 14,) as it attempted to do in the decree of February 28, 1890, then, so far as the record shows, *the said quo warranto case, so remitted, was still pending in the District Court when it rendered said decree of February 28, 1890.* (R., 16, fol. 31 and 32.) That being so, this section 380 of the Idaho Revised Statutes was applicable to the case; and the Supreme Court was prohibited by that section from making the order which it did make in the said decree of February 28, 1890 (R., 16), directing that a

writ of mandate issue by the Clerk of the Supreme Court directing the County Commissioners to order the issuing of warrants in the name of Havird for the amounts allowed, to wit, the said sum of $5,595.47, shown on page 8 of the record.

5. From what has now been last stated it is apparent that the case sent to the District Court on the remittitur is still there pending, and the title to the office is judicially undetermined, so far as this record, at any rate, discloses. And, on the ultimate merits, the case we have cited from Michigan, as well as the general principles of law applicable to such rights of usurpers, show that the intervenor, Gorman, is entitled to the $5,595.47 for which he sued in his intervening petition, if his title to the office should be ultimately sustained.

We therefore submit that there is neither a "color" of want of jurisdiction in the present case, nor is the appeal frivolous.

It is proper to remark, in conclusion, that if the Court should be of opinion that the record in the present case is imperfect, we shall then, at the proper time, ask the Court for the issuance of a writ of certiorari, for the purpose of perfecting the record; and we therefore ask that the case shall not be dismissed on account of any imperfections which the Court may deem to be in the record.

SAMUEL SHELLABARGER and
J. M. WILSON,
Attorneys for Appellant.

Office Supreme Court U. S.
FILED.
MAR 23 1891
JAMES. H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

No. 1296.

JOHN GORMAN, *Appellant*,

vs.

CARY C. HAVIRD.

Appeal from the Supreme Court of the Territory of Idaho.

JOHN GOODE,

Attorney for Appellee.

W. H. Moore & Co., Prints., 511 Eleventh St. N. W.

In the Supreme Court of the United States.

No. 1296.

JOHN GORMAN, *Appellant*,

vs.

CARY C. HAVIRD.

Appeal from the Supreme Court of the Territory of Idaho.

MOTION.

The appellee moves the Court:

1st. To dismiss the appeal in this cause for want of jurisdiction.

2d. To affirm the judgment of the Supreme Court of Idaho Territory, with ten per cent. damages, because it is manifest that the appeal is frivolous and merely taken for delay.

JOHN GOODE,
Attorney for Appellee.

STATEMENT.

As will be seen from the record, the Supreme Court of the Territory of Idaho, on the 28th day of February, 1890, in the matter of the application of Cary C. Havird for a writ of mandate against the Board of County Commissioners of Boise county, John Gorman, intervenor, rendered judgment in favor of the petitioner. That judgment was to the effect that the action then pending in the Second District Court in and for Boise county, entitled "the Territory of Idaho *ex rel.* John Gorman *vs.* C. C. Havird," should be dismissed, and that a writ of mandate should issue directing the county commissioners of Boise county to order the issuing of a warrant or warrants in the name of the plaintiff for the amounts allowed by said board for the time specified on account of fees and expenses, and that immediately upon the dismissal of said action by said District Court a writ of mandate should issue commanding said commissioners to order the issuing of a warrant or warrants in the name of the plaintiff for the amount due him as salary for the time specified. From that judgment this appeal was taken, and the appellee moves to dismiss on the ground that the value of the matter in dispute does not exceed five thousand dollars, as now required, to give this court jurisdiction.

The tabular statement of amounts allowed C. C. Havird as sheriff for the time specified shows that $2,798.00 was allowed on account of salary, $692.25 for boarding prisoners, $1,302.00 on account of jailer's fees, $595.22 for collecting license tax, $156.15 for transportation of prisoners, and $51.85 for collecting territorial license tax. These several sums amount in the aggregate to $5,595.47, but the amount of salary claimed was only $2,798, the residue of the claim consisting of fees and expenses as sheriff during the years 1887 and 1888.

Section 2156 of the Revised Statutes of Idaho reads as follows:

"The sheriff shall receive a salary of not less than $1,200 per annum and not to exceed $1,500 per annum; he shall also be allowed, in addition to such salary as fixed by said board, the sum of not less than one dollar nor more than one dollar and fifty cents per day for each prisoner confined in the county jail as remuneration in full for the board, clothing, lights, and medical attendance of such prisoners; he shall be allowed a jailer, for whose services he shall be allowed the sum of not less than two dollars and fifty cents nor more than three dollars and twenty-five cents per day for each day a prisoner or prisoners are confined in the county jail of his county."

The expenses incurred by the appellee as sheriff for boarding prisoners and jailer's fees during the years 1887 and 1888 amounted to $1,994.25. Deducting that amount it leaves the sum of $3,601.22 involved in the controversy between the appellant and appellee. The court below decided, after full investigation, that Mr. Havird was sheriff *de jure*. However that may be, he was undoubtedly sheriff *de facto*, and as such it became his official duty to provide for the support, maintenance, and safe keeping of the prisoners confined in the county jail. The record shows that during the time specified he expended $692.25 in boarding the prisoners, and $1,302 as jailer's fees. These amounts were allowed him by the Board of County Commissioners in the settlement of his accounts as sheriff. We submit that these sums having been necessarily expended by the appellee in the due administration of the office of sheriff could not possibly be recovered from him in any legal proceeding, and, therefore, were not involved in this dispute. Although it appears that the appellee claimed $5,595.47 as due him from the county for salary and expenses as sheriff during the years 1887 and 1888, yet the court will not take jurisdiction if it appears from an ex-

amination of the whole record that less than $5,000 was really involved in the dispute.

Jenness *vs.* Citizens' National Bank of Rome, 110 U. S., 67.
Wabash, St. Louis and P. R. R. Co. *vs.* Knox, 110 U. S., 155.
Gray *vs.* Blanchard, 97 U. S., 1108.
Schacker *vs.* Insurance Co., 93 U. S., 241.
Tintsman *vs.* First National Bank of Mt. Pleasant, 100 U. S., 530.

In Gray *vs.* Blanchard, Chief Justice Waite, delivering the opinion of the court, said :

"While, in the absence of anything to the contrary, the prayer for judgment by the plaintiff on his declaration or complaint upon a demand for money only or by the defendant in his counter claim or set off, will be taken as indicating the amount in dispute, yet, if the actual amount in dispute does otherwise appear in the record, reference may be had to that for the purpose of determining our jurisdiction. Ordinarily, this will be found in the pleadings, but we need not necessarily confine ourselves to them. We hear the case upon the record which is sent up, and if, taking the whole record together, it appears that we have no jurisdiction, the case must be dismissed."

An examination of the whole record in this case will show that the expenses incurred by the sheriff during the time specified in boarding the prisoners and for jailer's fees could not possibly be involved in the contest between the parties for the office in question. If those expenses are deducted the amount in dispute will be reduced below the sum of five thousand dollars.

Again, section 380 of the Revised Statutes of Idaho provides that "when the title of the incumbent of any office in this Territory is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such pro-

ceedings have been finally determined." We submit that, as *de facto* officer, the appellee was entitled to his expenses incurred in the administration of the office, and that an action on account thereof would not lie until the title to the office was settled. But, if these expenses could be litigated in this action, the appellant has not made any showing to the effect that the profits of the *de facto* officer added to the salary reserved bring the amount involved up to the sum of five thousand dollars. We submit that the case should be dismissed for want of jurisdiction. If, however, the court should be of opinion that it has jurisdiction, then we submit that the judgment should be affirmed, because it is manifest from the record that the appeal is frivolous and has been taken merely for delay.

Very respectfully,

JOHN GOODE,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 1296.

JOHN GORMAN, Appellant,
vs.
CARY C. HAVIRD.

Appeal from Supreme Court of Idaho Territory.

The appellant, John Gorman, will take notice that on Monday, the 23d day of March, 1891, the appellee, Cary C. Havird, will move the Supreme Court of the United States to dismiss, for want of jurisdiction, the appeal upon which the above-entitled cause is now pending in said court, and will at the same time move the said court to affirm the judgment from which the said appeal is taken on the ground that, although the record may show that the Supreme Court of the United States has jurisdiction, yet it is manifest that the appeal was taken for delay only, and that the questions involved are so frivolous as not to need further argument.

JOHN GOODE,
Attorney for Appellee.

The appellant has been served with a copy of the above notice, and with a copy of the brief of the appellee's attorney for three weeks prior to the 23d of March, 1891.